76-1500

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In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1500

THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

	Page
Introductory Statement	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	4
Reasons for Granting the Writ	4
I. There Are Special and Important Reasons for Exercising This Court's Discretion to Review the Decision of the Court of Appeals	4
II. The Decision of the Court of Appeals Is In Error	8
Conclusion	12
Appendix A	A-1
Opinion of the District Court	A-1
Judgment of the District Court	A-4
Opinion of the Court of Appeals	A-5
Judgment of the Court of Appeals	A-11
Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division in State of Georgia v. United States of America	A-12

Table of Citations

Cases

Cannon v. *New Orleans*, 20 Wall. 577 (1874)	11
Carley & Hamilton v. *Snook*, 281 U.S. 66 (1930)	11
Clyde Mallory Lines v. *Alabama*, 296 U.S. 261 (1935)	9
Collector v. *Day*, 11 Wall. 113 (1870)	5
Evansville-Vanderburgh Airport Authority District v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972)	10
Georgia v. *United States*, C.A. No. 75-11-5A (N.D. Ga. April 14, 1977)	7
Helvering v. *Gerhardt*, 304 U.S. 405 (1938)	6

	Page
Helvering v. *Powers*, 293 U.S. 214 (1934)	6
Indian Motorcycle Co. v. *United States*, 283 U.S. 570 (1931)	5
McCulloch v. *Maryland*, 4 Wheat. 316 (1819)	5
National Cable Television Association v. *United States*, 415 U.S. 336 (1974)	9
National League of Cities v. *Usery*, 426 U.S. 833 (1976)	5, 6, 7
New York v. *United States*, 326 U.S. 572 (1946)	6
Packet Co. v. *Keokuk*, 95 U.S. 80 (1877)	10
Rice v. *Sioux City Cemetery*, 349 U.S. 70 (1955)	8
South Carolina v. *United States*, 199 U.S. 437 (1905)	6
United States v. *County of Fresno*, 97 S.Ct. 699 (1977)	5
United States v. *Tax Commission of Mississippi*, 421 U.S. 599 (1975)	9
Vicksburg v. *Tobin*, 100 U.S. 430 (1879)	10

Constitutional Provisions

United States Constitution, Art. I, §10	9

Statutes

26 U.S.C. §4491	2, 3, 4, 7, 10
§4492(c)	10
28 U.S.C. §1254(1)	2
§1346(a) (1)	4
49 U.S.C. §1301(24)	10
§1348	10
§1701	9
§1713	10
§1717	10
§1718(5)	10
§1742	8
14 C.F.R. §§187.1—187.5	9
U.S. Supreme Court Rule 19(b)	7

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THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Introductory Statement

The Commonwealth of Massachusetts petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the court of appeals is reported at 548 F.2d 33 and is appended hereto at pp. A-5 through A-10. The opinion of the district court is not reported and is appended hereto at pp. A-2 through A-3.

Jurisdiction

The judgment of the court of appeals was entered on January 28, 1977 and is appended hereto at p. A-11. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the application of the aircraft use tax (26 U.S.C. §4491) to a helicopter owned by the Commonwealth of Massachusetts and used for public safety purposes violates the constitutional principle of intergovernmental tax immunity?
2. Whether designation of revenue from the aircraft use tax for airport expansion and development exempts the tax from the principle of intergovernmental tax immunity?

Statute Involved

28 U.S.C. §4491.

(a) *Imposition of Tax.*—A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

(1) $25, plus
(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft), 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine-engine-powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.

(b) *By whom paid.*—Except as provided in section 4493(a), the tax imposed by this section shall be paid—

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or
(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

(c) *Proration of tax.*—If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection (a) (2) shall be reckoned proportionately from the first day of the month in which such use occurs to and including the last day in such year.

(d) *One tax liability per year.*—

(1) In general.—to the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.
(2) Cross reference.—

For privilege of paying tax imposed by this section in installments, see secton 6156.

(e) *Termination.*—On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

Statement of the Case

By way of suit for refund, the Commonwealth of Massachusetts challenged the validity of applying the federal excise tax on the use of civil aircraft, 26 U.S.C. §4491, to a helicopter used by the Massachusetts State Police. Since the tax was a direct assessment on the Commonwealth for the performance of an essential function, the Commonwealth claimed that the tax levy violated the constitutional principle of intergovernmental tax immunity. Federal jurisdiction was based on 28 U.S.C. §1346(a)(1).

The United States District Court for the District of Massachusetts dismissed the complaint for failure to state a claim upon which relief can be granted. The district court held that (a) the States are not immune from federal taxation, (b) the aircraft use tax was properly classified as a user's fee, and (c) the user tax may be levied against a State, principles of intergovernmental tax immunity notwithstanding. (A-2 – A-3).

On appeal, the court of appeals affirmed the judgment of dismissal. The court declined to decide the issue of intergovernmental tax immunity and relied solely on the ground that the tax was a user charge or fee. (A-7, 548 F.2d at 35). That conclusion was based on the fact that revenue derived from the tax is intended for airport expansion and development.

Reasons for Granting the Writ

I. There Are Special and Important Reasons For Exercising This Court's Discretion To Review the Decision of the Court of Appeals.

There are essentially three special and important reasons for reviewing the decision of the court of appeals. First, in sustaining the imposition of the aircraft use tax on the Commonwealth, the court of appeals has undermined the

salutary purpose of the principle of intergovernmental tax immunity. Its assertion that user taxes are not covered by this principle is a novel concept, with broad implications, that deserves resolution by this Court. Second, this Court's recent reaffirmation of the immunity of the States from federal taxation in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) directly contradicts not only the conclusion reached by the court of appeals but its underlying attitude toward State immunity as well. Third, the judgment of the First Circuit Court of Appeals is in conflict with a recent decision on the same question by a district court for the Northern District of Georgia. Since the Georgia decision is directly appealable to this Court, there exists, in substance, a conflict between two circuits which merits plenary consideration by this Court.

The decision of the court of appeals presents a serious challenge to an integral principle in our federal-state constitutional system. The uses to which the revenue from the aircraft use tax are put are irrelevant on this score. The imposition of the aircraft use tax on the performance of police functions is necessarily a direct infringement on the sovereignty of the Commonwealth of Massachusetts.

The Commonwealth's claim of tax immunity for its State Police helicopter is based on a solid constitutional foundation. That immunity from taxation is a necessary incident of sovereignty was first formulated in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) and recently affirmed in *United States* v. *County of Fresno*, 97 S. Ct. 699 (1977). While that line of authority involved the immunity of the federal government from state taxation, the reciprocal nature of the tax immunity doctrine is well established. *Collector* v. *Day*, 11 Wall. 113 (1870); *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570 (1931). The immunity of the State Police helicopter under this doctrine is self-evident. The aircraft use tax is imposed directly on the Commonwealth

for the performance of the sovereign function of promoting the public safety. "[I]t is plain that the invalidity is due wholly to the fact that it is a State which is being taxed so as unduly to infringe, in some manner, the performance of its function as a government which the Constitution recognizes as a sovereign." *New York* v. *United States*, 326 U.S. 572, 588 (1946) (plurality opinion).

The aircraft use tax cannot be justified by reference to limitations on the tax immunity doctrine; these limitations are inappropriate in this case. For example, the Commonwealth is not claiming tax immunity for a non-essential function, which has long been held subject to federal taxation. *E.g.*, *New York* v. *United States*, *supra*, (sale of mineral water); *Helvering* v. *Powers*, 293 U.S. 214 (1934) (operation of street railway); *South Carolina* v. *United States*, 199 U.S. 437 (1905) (sale of liquor). Nor is the Commonwealth claiming tax immunity for its employees; even though the economic burden may be passed on to the State, public employees are not immune from federal taxation. *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938). These exceptions to the tax immunity principle have had the beneficial effect of producing a firm but limited content to the principle. By employing the user fee designation, the court of appeals has injected a new element of uncertainty into this area, without direct support from the decisions of this Court. (*See infra* Part II)

The second compelling reason for review is the failure of the decision to deal substantively with this Court's recent seminal statement on the "essential role of the States in our federal system of government" in *National League of Cities* v. *Usery*, 426 U.S. 833, 844 (1976). That case involved a limitation on the power of Congress to regulate interstate commerce; nonetheless, the Court's underlying recognition that Congressional authority is subject to state-oriented limitations imposed by the Constitution is identical to that

relied upon in tax immunity decisions. The Court stated that "[w]e have repeatedly recognized that there are attiributes of sovereignty attaching to every state government which may not be impaired by Congress, ..." 426 U.S. at 845. In this regard the Court referred directly to the principle of intergovernmental tax immunity stating that "this 'immunity' is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority." 426 U.S. at 844 n. 14. Thus, any discussion of the validity of applying the aircraft use tax to the Commonwealth absolutely requires that the implications of *National League of Cities* v. *Usery* be addressed. Such consideration was not afforded by the court of appeals.

The third "special and important reason" for granting certiorari in this case arises from the decision in *Georgia* v. *United States*, C.A. No. 75-1155A (N.D. Ga. April 14, 1977).[1] The district court in that case ordered a refund of the aircraft use tax as applied to aircraft owned and operated by the State of Georgia. Since that decision held that 26 U.S.C. §4491 was unconstitutional, the appeal lies directly to this Court under 18 U.S.C. §1252. The decision of the court of appeals in this case is thus in direct conflict with a decision which in effect is final in another circuit. This clear conflict demands resolution by this Court according to the principles behind Supreme Court Rule 19(b).

Under Supreme Court Rule 19, a petition for a writ of certiorari will be granted for special and important reasons. " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially

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[1] A copy of the judgment of the district court is appended hereto at pp. A-12 – A-13. Should the United States appeal from that judgment, it should not be heard to oppose Massachusetts' petition for review. Once having asserted the importance of the issues involved, it should, to be consistent, support Massachusetts' argument to the same effect.

true where the issues involved reach constitutional dimensions, for then there comes into play regard for the court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955). The necessity for resolution of the constitutional issue presented by the imposition of the aircraft use tax on the Commonwealth transcends the particular amount of the tax involved or the single item being taxed. Moreover, the police nature of the State function being taxed provides a concrete instance for resolution of the tax immunity issue.

II. The Decision of the Court of Appeals Is In Error.

The court of appeals withdrew the aircraft use tax from the scope of the principle of intergovernmental tax immunity because it believed "that the tax here at issue is, in reality, a user charge." (A-7, 548 F.2d at 35). Its basis was the prior congressional designation that the revenue derived from the tax be used for airport development and expansion. *See* 49 U.S.C. §1742 establishing the Airport and Airway Trust Fund. The circuit court did not dispute that insofar as a distinction exists between taxes and fees, this levy is a tax. Rather, it attempted to distinguish among taxes, based on the intended use of the revenues. There is, however, no decision of this Court that states or implies that the characterization of a tax as user-oriented negatives principles of State sovereignty and permits taxation of the performance of essential State functions.

The fundamental difference between a tax and a user charge or fee is that the former is the exaction of a sovereign designed to provide revenue while the latter is that of a public agency designed to compensate the agency for the bestowing of a benefit, not shared by the public generally. *See National Cable Television Association* v. *United States*, 415 U.S. 336, 340-341 (1974). The court of appeals did not purport to find that the aircraft use tax was not a tax, but merely focussed on the use of the revenue for airport expansion and development to support the additional characterization of the tax as a user charge.[2]

Since the aircraft use tax does not even purport to be a fee charged by a public agency, the validity of such a charge should not have been discussed by the court of appeals. The Commonwealth does not challenge the validity of any of the particular fees charged by the Federal Aviation Administration. *See* 14 C.F.R. §§187.1-187.5. Nor does the application of the principle of intergovernmental tax immunity to the aircraft use tax undermine the authority for the charging of such fees. The court of appeals should therefore have proceeded directly to address the question of tax immunity.

Rather than discuss the generally accepted differences between taxes and charges or fees, the court of appeals upheld the use tax largely on the basis of a strained and inappropriate analogy to wharfage fees charged to vessels using publicly owned wharves. On various occasions this Court has sustained such charges as not coming within the scope of the constitutional prohibition against duties on tonnage. U.S. Constitution Art. I, §10. Such fees have been upheld as charges for the support and maintenance of wharfage facilities justifiably enacted by the owners of such facilities. *Clyde Mallory Lines* v. *Alabama*, 296 U.S.

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[2] The aircraft use tax is obviously " 'an enforced contribution to provide for the support of government' the standard definition of a tax. *United States* v. *LaFranca*, 282 U.S. 568, 572 (1931)." *United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 606 (1975). The revenue is used "to meet the demands of interstate commerce, the postal service, and the national defense." 49 U.S.C. §1701.

261 (1935); *Vicksburg* v. *Tobin*, 100 U.S. 430 (1879). The fact that the owners of the wharves were public agencies did not deprive them of rights incident to such ownership. "[W]hen compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property." *Packet Co.* v. *Keokuk*, 95 U.S. 80, 85 (1877).

The aircraft use tax cannot be sustained under the rationale that is is a right of property, rather than an assertion of sovereignty. Section 4491 is a tax on the use of navigable airspace. 26 U.S.C. §4492(c). The United States is not the proprietor of the navigable airspace. Rather, the United States, through the Federal Aviation Administration, defines and regulates such airspace in its sovereign capacity. 49 U.S.C. §§1301(24), 1348. *Cf. Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 720-721 (1972).

The designation of the revenue for airport development and expansion does not transform the United States into a proprietor for purposes of analyzing the aircraft use tax. That revenue is distributed in the form of grants to public agencies that do own airports. 49 U.S.C. §1713. Thus even when the focus is shifted from the regulation of navigable air space to the ownership of airport facilities, the user fee characterization remains incorrect. The proprietor of the airport is the State or its political subdivision. While the public agency is the possible recipient of financial assistance, that agency must match the federal grant generally to the extent of 50%. 49 U.S.C. §1717. Thus, in light of the State's own contribution, when its aircraft uses an airport which has received federal funds, it is unfair to suggest that a claim of tax immunity constitutes avoidance of financial responsibilities with re-

spect to federally-assisted improvements.[3] This misconceived consideration appears to have motivated the court of appeals. (A-10, 548 F.2d at 36).

That the aircraft use tax is not properly characterized as the charge of a proprietor is conclusively demonstrated by this Court's treatment of the State motor vehicle registration fee considered in *Carley & Hamilton* v. *Snook*, 281 U.S. 66 (1930). Even though the revenue was used for the construction and maintenance of highways, the Court held that it was not a toll or charge for the use of federally-assisted highways.

> The fact that registration fees are imposed generally upon all residents who use motor vehicles within the state, without reference to any particular highways or to the extent or frequency of their use . . . marks them as demands of sovereignty, not of proprietorship, and likens them to taxes rather than to tolls. 281 U.S. at 73-74.

As the aircraft use tax is imposed on the use of navigable airspace and incidentally public airports "without reference to any particular [federally-assisted airports] or to the extent or frequency of their use", it is clearly the levy of a sovereign and not of a proprietor.

Finally, insofar as any analogy to wharfage fees is appropriate, the relevant comparison is to those considered in *Cannon v. New Orleans*, 20 Wall. 577 (1874). The Court there invalidated a local ordinance which taxed vessels which landed at any point on the river bank irrespective

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[3] While the Commonwealth does not challenge the validity of fees exacted by the Federal Aviation Administration, one of the conditions imposed on the receipt of federal funds is that federal aircraft be able to use the facilities without charge except where such use is substantial. 49 U.S.C. §1718(5).

of whether municipal wharves were used. The tax could not therefore be considered solely as compensation for the use of such wharves. The general tax on the use of navigable airspace suffers from the same infirmity in that the tax is not keyed to the use of federally-assisted airports alone.

It is thus clear the validity of the aircraft use tax cannot be disposed of by means of a user fee classification. The use of such an approach where the sovereign interests of the Commonwealth are directly affected raises a substantial federal question which should be resolved by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GARRITY, J.

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF,
v.
UNITED STATES OF AMERICA,
DEFENDANT.

Civil Action
No. CA 75-221

DEFENDANT'S MOTION TO DISMISS

APPEARANCES:

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for the Plaintiff.

DENNIS DONOHUE, ESQ., *United States Department Tax Division.*
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for the Defendant.

United States Court House
Post Office Square
Boston, Massachusets 02109
3:20 o'clock p.m.
Monday, February 23, 1976

• • •

[2] OPINION

The Court: I think I will decide the matter at this ti. e, partly because the District Court Opinion may well not be the last word on this question, and, therefore, I am not as anxious as I might be under other circumstances to write precisely and at length.

I grant the Motion To Dismiss.

I think that the law is set out correctly in Judge Cannella's Opinion, City of New York against the United States, Southern District of New York, 1975 394 F. Supp. 641. I see no purpose in endeavoring to improve upon that Court's analysis.

The second determinative fact here, in my view, is that the monies raised by this tax, which I think is actually properly classified as a User's Fee, goes into the trust fund. It's a special trust fund earmarked for the expansion of the air transportation system.

If the funds raised went into the general coffers of the Federal Treasury, I think Mr. O'Malley's argument would be stronger. Here, however, not only, as I say, paraphrasing Judge [3] Cannella's reasoning, you have a nondiscriminatory tax and one which I cannot feel could materially handicap any operation of the State Government.

Here you have the classic-use situation, as I see it. The federal program is designed to make the use of helicopters and other aircraft safer. It enables the State's helicopter and aircraft owned by all sorts of other persons and businesses to land on a safe airport rather than in somebody's cabbage patch or chimney. The funds are so intimately tied to the use of the product to which the registration fee attaches that I feel that the levy is properly classified as a User's Fee.

I wondered about its appearance in the Internal Revenue Code, but the answer, at least in my mind, to that fact is

the point I already mentioned, namely, that the funds raised go into a special trust fund whose expenditures are restricted to the Statute.

I can't say a great deal more about it, except that the Motion is allowed and judgment of dismissal will be entered on behalf of the Defendant. That concludes my statement of the decision in this matter.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 75-3987-G

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF
v.
UNITED STATES OF AMERICA,
DEFENDANT

JUDGMENT

The Court having entered its oral decision on February 23, 1976, granting the defendant's motion to dismiss

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff's complaint be dismissed, with prejudice, and that the defendant, United States of America, recover from plaintiff its costs of this action.

SO ORDERED AND ADJUDGED on this 26th day of March, 1976.

s/W. ARTHUR GARRITY
United States District Judge

United States Court of Appeals
For the First Circuit

No. 76-1277.

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF-APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

Terence P. O'Malley, Asst. Atty. Gen., Boston, Mass. with whom *Francis X. Bellotti*, Atty. Gen., Boston, Mass., was on brief, for plaintiff-appellant.

Alfred S. Lombardi, Atty., Tax Div., Dept. of Justice, Washington, D.C., with whom *Scott P. Crampton*, Asst. Atty. Gen., Washington, D.C., *James N. Gabriel*, U.S. Atty., *William A. Brown*, Asst. U.S. Atty., Boston, Mass., *Gilbert E. Andrews, Jr.*, and *Ann Belanger Durney*, Attys., Tax Div., Dept. of Justice, Washington, D.C., were on brief, for appellee.

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

McENTEE, *Circuit Judge*.

The United States imposes an annual tax on the use of all taxable civil aircraft. 26 U.S.C. § 4491. This case involves a challenge by the Commonwealth of Massachusetts to the validity of that annual assessment insofar as it affects the Commonwealth. Specifically, the Commonwealth argued in its suit for a refund in the district court and before us that the tax of $130[1] imposed on it for the use of its state police

[1] The annual rate is $25, plus (for an aircraft of the type involved in this case) "3½ cents a pound for each pound of the maximum certificated takeoff weight." 26 U.S.C. § 4491(a).

The Commonwealth actually sued for a refund in the amount of $183.30, the amount levied by the Internal Revenue Service upon funds of the Commonwealth held by the First National Bank of Boston. This sum includes the underlying tax and also statutorily authorized interest and penalties.

helicopter from July 1, 1970 through June 30, 1971, was unconstitutional as violative of the principle of intergovernmental tax immunity. The district court, however, was not persuaded and dismissed the case for failure to state a claim upon which relief could be granted. We affirm, although on a narrower basis than was relied upon by the court.[2]

In its brief and at oral argument before us the Commonwealth has essentially based its entire case on the theory of intergovernmental tax immunity—a theory which the United States alleges is for all practical purposes moribund if not obsolete. While the discussion by both parties of this venerable[3] concept of constitutional law has been both scholarly and interesting, we need not decide at this time whether the principle "maintains its vitality," as the Commonwealth contends,[4] or whether it is a "doctrine of questionable validity," as the United States asserts.[5] We

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[2] The district court dismissal was based on two, apparently independent, predicates. First, the court found persuasive the analysis of the law of intergovernmental tax immunity which is contained in *City of New York* v. *United States*, 394 F.Supp. 641 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 308 (2d Cir.), *cert. denied*, ___ U.S. ___, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976). But the court also said of the challenged tax that it "is actually properly classified as a User's Fee" and saw the existence of a special trust fund as being particularly relevant in that regard. *See* discussion *infra*.

[3] *See, e.g., Collector* v. *Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122 (1870); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

[4] *Compare New York* v. *United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946) *with National League of Cities* v. *Usery*, ___ U.S. ___, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). *See also Fry* v. *United States*, 421 U.S. 542, 547-48 n. 7, 95 S.Ct. 1792, 44 L.Ed. 2d 363 (1975); Note, Municipal Bankruptcy, The Tenth Amendment and the New Federalism, 89 Harv.L.Rev. 1871, 1873-74 (1976).

[5] *See, e.g., City of New York* v. *United States, supra*. *See also* Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv.L.Rev. 682, 712 & n. 138 (citing cases). *See generally*, The Remnant of Intergovernmental Tax Immunities, 58 Harv.L.Rev. 757 (1945); Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv.L.Rev. 633 (1945).

are not required to confront this issue because we believe that the tax here at issue is, in reality, a user charge. We view it as "a charge for services rendered [which] represents a quid pro quo, and [which] as such, is outside the scope of the doctrine of implied intergovernmental tax immunity." *Texas* v. *United States*, 72-2 U.S. Tax Cas. ¶ 16,047 (W.D.Tex. 1972), *aff'd*, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973). *See also New York* v. *United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946); *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265-66, 56 S.Ct. 194, 80 L.Ed. 215 (1935); *Head Money Cases*, 112 U.S. 580, 5 Ct. 247, 28 L.Ed. 798 (1884); *Vicksburg* v. *Tobin*, 100 U.S. 430, 432-33, 25 L.Ed. 690 (1879); *Packet* v. *Keokuk*, 95 U.S. 80, 24 L.Ed. 377 (1877). *Cf. Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972); *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577, 581-82, 22 L.Ed. 417 (1874).

In 1970 Congress enacted both the Airport and Airway Development Act of 1970, P.L. 91-258, 84 Stat. 219, and the Airport and Airway Revenue Act of 1970, P.L. 91-258, 84 Stat. 236. These two acts were considered together and were passed simultaneously. In their combined form they are commonly referred to as the Airport and Airway Development and Revenue Acts of 1970, Act of May 21, 1970, P.L. 91-258, 84 Stat. 219. Title I of the combined act provides for the expansion and development of various air transportation programs, and Title II deals with the raising of revenue to fund such programs. Various user charges were established by Congress as a partial source of this needed revenue. It is abundantly clear from the legislative history of the Acts that Congress intended the tax imposed by § 4941[6] to be part of this overall scheme of user charges.

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[6] In our view, the fact that this tax is codified in the Internal Revenue Code (26 U.S.C.) is irrelevant to the question of whether or not it is in reality a user charge.

Purely by way of example, we may cite the following language from the House Report:

> "[T]he Ways and Means Committee has decided to also establish a schedude of annual registration taxes for both commercial and general aviation aircraft. . . . It appears appropriate to impose some direct user charge on air carriers themselves in addition to the increased taxes on air passengers and air shippers, since air carriers presently are not paying a direct user tax with respect to the use of the aviation system. The aircraft registration fee is based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system." H.R.Rep. No. 91-601, 91st Cong., 2d Sess., 1970 U.S.Code Cong. & Admin. News, pp. 3047, 3085.

[1] Of course, the fact that an assessment is *labeled* a user charge is not of itself conclusive. *Cf. Packet Co.* v. *Keokuk, supra,* 95 U.S at 86, 24 L.Ed. 377. Rather "[i]t is the thing, and not the name, which is to be considered." *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 314, 13 L.Ed. 996 (1851). But in this instance the term "user charge" well describes the essence of the challenged assessment. The revenue raised by this charge is applied directly to benefit those who must pay the charge. "The sum demanded . . . is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money this raised . . . is appropriated in advance to the uses of the statute, and does not go to the general support of the government." *Head Money Cases, supra,* 112 U.S. at 595-96, 5 S.Ct. at 252.

In *Packet Co.* v. *Keokuk, supra,*[7] the Supreme Court

[7] The *Keokuk* case concerned a challenge to wharfage fees charged (on a per ton basis) by a municipal corporation. The Supreme Court rejected the argument that such fees contravened the constitutional prohibition against a state "lay[ing] any duty of tonnage" (U.S. Const. art. I, § 10).

explained why such charges are readily distinguishable from general taxes:

> "To determine whether the charge prescribed by the ordinance in question is a duty of tonnage, within the meaning of the Constitution, it is necessary to observe carefully its object and essence. . . . [A] charge for services rendered or for conveniences provided is in no sense a tax or a duty. . . . It is a tax or a duty that is prohibited: something imposed by virtue of sovereignty, not claimed in right of proprietorship. Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. . . . [A]nd, when compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property." 95 U.S. at 84-85, 24 L.Ed. 377.

[2] The applicability of the *ratio* of the *Keokuk* case to the case at bar is clear. In each instance the challenged tax—when "its object and essence" is observed—is demonstrably "a charge for services rendered." *Id.* at 84, 24 L.Ed. 377. It is uncontested that the moneys raised by the tax at issue here will result in improved airports and airways, which improvements will be beneficial to all users. There is simply no indication that the challenged registration tax is anything more than a relatively miniscule assessment to help finance "services rendered to and enjoyed by" aircraft generally. *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 266, 56 S.Ct. at 196.

An additional feature of the legislation establishing the tax at issue here which reinforces our view that it is a user charge is Congress's establishment of an Airport and Airway Trust Fund. This trust fund is the repository, *inter alia,* of funds raised under 26 U.S.C. § 4491. *See* 49 U.S.C. § 1742. It was created "in order to insure that

the air user taxes are expended only for the expansion, improvement, and maintenance of the air transportation system." H.R.Rep. No. 91-601, 91st Cong., 2d Sess., 1970 U.S.Code & Admin.News, pp. 3047, 3085. The existence of this fund reflects the "direct relationship between the use of the system and the money generated to meet the needs required by the users." *Id.* at p. 3049.

Accordingly, whatever might be the current state of the law regarding intergovernmental tax immunity, we are convinced that "[n]othing in the historical basis of dual sovereignty underlying the principle of state immunity from federal taxation requires that the states continue to receive the benefit of airway facilities and services actually used by the states but furnished by the Federal Government without bearing their equitable share of the costs incurred in providing those particular benefits.... No logical reason exists why all users of the air transportation system should not pay their fair share of such costs." *Texas* v. *United States, supra.*

Affirmed.

United States Court of Appeals
For the First Circuit

No. 76-1277.

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF, APPELLANT,
v.
UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

JUDGMENT
Entered January 28, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
(s) DANA H. GALLUP, *Clerk.*

[cc: Messrs. O'Malley and Lombardi.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action
No. 75-1155A

STATE OF GEORGIA, DEPARTMENT OF TRANSPORTATION,
PLAINTIFF,
v.
UNITED STATES OF AMERICA,
DEFENDANT

JUDGMENT

This action having come on for consideration by the Court, Honorable Richard C. Freeman, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered granting Plaintiff's motion for summary judgment and denying Defendant's motion for summary judgment, and timely appeal having been taken by Defendant to the United States Court of Appeals for the Fifth Circuit, and this Court having received the court's subsequent order vacating the judgment of this Court and remanding the referenced cause to this Court in order that this Court might enter a new judgment from which direct appeal to the Supreme Court might be taken,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that this Court's judgment dated January 25, 1977 and entered *nunc pro tunc* December 30, 1976 is hereby vacated and set aside, and that judgment be and the same hereby is entered in favor of Plaintiff, State of Georgia, Department of Transportation against Defendant, United States of America, in the amount of $4,110.52 in tax and $191.70 assessed interest for a total amount of $4,302.22, plus in-

terest according to law from July 26, 1971, and that the Plaintiff also recover of the Defendant its costs of this action.

This 13th day of April, 1977.

s/RICHARD C. FREEMAN
United States District Judge

CONSENTED TO AS TO FORM:

MYRON C. BAUM
Acting Asst. Atty. Gen.
Tax Division
GILBERT ANDREWS
Chief, Appellate Section
GIL ROTHENBERG
Asst. Atty. Gen.
JOHN W. STOKES, JR.
United States Atty.
By: s/SHERMAN D. JOHNSON
SHERMAN D. JOHNSON
Asst. United States Atty.
Attorneys for Defendant

ARTHUR K. BOLTON
Atty. Gen.
ROBERT S. STUBBS, II
Exec. Asst. Atty. Gen.
s/RICHARD L. CHAMBERS
RICHARD L. CHAMBERS
First Asst. Atty. Gen.
s/H. PERRY MICHAEL
H. PERRY MICHAEL
Senior Asst. Atty. Gen.
s/DAVID A. RUNNION
DAVID A. RUNNION
Asst. Atty. Gen.
Attorneys for Plaintiff

Supreme Court, U. S.
FILED
AUG 25 1977
MICHAEL RODAK, JR., CLERK

APPENDIX.

In the Supreme Court of the United States.

OCTOBER TERM, 1976

No. 76-1500

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Certiorari Filed April 28, 1977

Certiorari Granted June 20, 1977

Table of Contents.

Docket entries, United States District Court, District of Massachusetts	1
Docket entries, United States Court of Appeals for the First Circuit	4
Complaint	6
Exhibit A	10
Exhibit B	12
Exhibit C	13
Exhibit D	15
Exhibit E	18
Defendant's motion to dismiss for failure to state a claim upon which relief can be granted	19
Plaintiff's notice of appeal	21
Order allowing certiorari	22

United States District Court
District of Massachusetts

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v. CIVIL ACTION NO. 75-3987-G

UNITED STATES OF AMERICA,
DEFENDANT

Docket Entries

1975		
September		
23	Complaint filed.	
	Summons, issued.	
November		
17	Marshal's return of service dated 10/8/75, filed.	
December		
10	Deft's motion to dismiss for failure to state a claim upon which relief can be granted, filed.	
	Deft's memorandum in support of motion to dismiss, filed, c/s.	

1976

January

3 *Garrity, J.* Procedural Order: No opposition has been filed to d's motion to dismiss; if allowance opposed, Pltf. shall file a memorandum of law, fully responding to D's memorandum filed 12/10/75 on or before 1/23/76, cc/cl

23 P's motion (assented to) to extend time for filing memorandum of law until 1/28/76, filed.

27 P's memorandum of law in opposition to motion to dismiss, filed, c/s.

29 *Garrity, J.* 2nd Procedural Order: Hearing on Deft's motion to dismiss scheduled for 2/23/76 at 3 PM, cc/cl. Any reply brief by defendant shall be filed on or before 2/17/76.

February

10 Pltf's request for production of documents, filed, c/s

23 Deft's reply memorandum in support of D's motion to dismiss, filed c/s

Garrity, J. After hearing, Deft's motion to dismiss GRANTED for reason dictated to the court reporter.

March

26 *Garrity, J.* Judgment, ENTERED, cc/cl

April

26 Plntff's Notice of Appeal, filed. c/s.

1976

June

16 Certified copy of docket entries and Original pleadings forwarded to Court of Appeals for the First Circuit.

1977

January

31 Opinion received from the Court of Appeals entered. . . . Affirmed.

February

23 Mandate received from the Court of Appeals entered. . . . Affirmed. Costs in favor of appellee $196.80. Original pleadings returned from Court of Appeals.

United States Court of Appeals for the First Circuit

No. 277

COMMONWEALTH OF MASSACHUSETTS

v.

UNITED STATES OF AMERICA

Docket Entries

1976		
June		
16		Record on appeal in one volume filed and case docketed by leave of court.
21		Statement of issues and designation of contents, filed.
29		Appearances of Scott P. Crampton and Gilbert E. Andrews for appellee, filed.
July		
20		Motion filed. Order (Coffin, Ch. J.) enlarging time for filing brief and appendix to July 30, 1976 and further enlarging time for filing brief for appellee to August 27, 1976. Notices mailed.
30		Brief for appellant and appendix filed.
August		
27		Brief for appellee filed.
		Appearances of Gilbert Andrews, Ann Belanger and Alfred S. Lombardi for appellee filed.

1976		
September		
13		Heard by Coffin, McEntee and Campbell.
January		
28		JUDGMENT: The judgment of the district court is affirmed. Notices mailed. Opinion of the court by McEntee, Circuit Judge.
1977		
February		
10		Verified and itemized bill of costs filed for appellee.
18		Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed.
May		
3		Notice of filing petition for certiorari 76-1500 April 28, 1977.
June		
25		Order of Supreme Court granting the petition for a writ of certiorari. June 20, 1977.

United States District Court
District of Massachusetts

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v. CIVIL ACTION NO. 75-3987-G

UNITED STATES OF AMERICA,
DEFENDANT

Complaint

INTRODUCTORY STATEMENT

1. This is a civil action for refund of a tax illegally imposed on the Commonwealth of Massachusetts by the Internal Revenue Service. The federal excise tax on the use of civil aircraft was applied to a helicopter owned and operated by the Commonwealth. As the helicopter is used exclusively for state police purposes, the tax on its use violates the constitutional principle of intergovernmental tax immunity and is therefore invalid.

SUBJECT MATTER JURISDICTION

2. The jurisdiction of this Court over an action against the United States for the illegal imposition and collection of a tax is provided by 28 U.S.C. § 1346(a)(1). The aircraft use tax for the period July 1, 1970 through June 30, 1971

has been paid in full and a claim for refund duly filed. The Internal Revenue Service has rejected that claim.

PARTIES

3. The plaintiff is the Commonwealth of Massachusetts, a sovereign State of the United States of America. Funds of the Commonwealth were the source of payment for the aircraft use tax.

4. The defendant is the United States of America, the proper party defendant in a civil action for refund under 26 U.S.C. § 7422.

STATEMENT OF FACTS

5. The Department of Public Safety is a duly constituted agency of the Commonwealth of Massachusetts. Within that department is the Division of State Police. Mass Gen. L. ch. 22, § 3. The purpose of the state police is "to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth." Mass. Gen. L. ch. 22, §§ 9, 9A.

6. One instrument utilized by the state police in performing its public functions is a helicopter, owned by the Commonwealth and operated by state police personnel. This helicopter was obtained by the state police in November 1969 and was registered with the Federal Aviation Administration (#N1 484W) as a public use aircraft.

7. The state police helicopter is primarily used to promote highway safety. In the course of performing that function it serves as an airborne command post, effects emergency evacuations in cases of personal danger and provides transportation in medical emergencies. The heli-

copter is also used to promote other public safety functions such as assisting in searches for criminals and escapees from correctional facilities.

8. The state police helicopter was used exclusively for state police purposes during the period July 1, 1970 through June 30, 1971.

9. On March 20, 1974, the Internal Revenue Service demanded immediate payment of the aircraft use tax from the Commonwealth of Massachusetts for the period of July 1, 1970 through June 30, 1971. (Exhibit A). Along with the tax of $131.43, interest in the amount of $26.75 and penalty in the amount of $25.22 was demanded. On the basis of legal advice from the Attorney General of Massachusetts, the Department of Public Safety refused to pay the tax. (Exhibit B).

10. On April 26, 1974, the Internal Revenue Service levied on funds of the Commonwealth of Massachusetts held by the First National Bank of Boston. (Exhibit C). The amount of $183.00 thus collected was for the tax, plus interest and penalty, on the use of the state police helicopter for the period July 1, 1970 through June 30, 1971.

11. On June 5, 1974 the Commonwealth of Massachusetts filed a claim for refund of the monies collected. The claim was based on the unconstitutionality of a tax whose legal incidence is on a sovereign State of the United States and whose subject involves the performance of an exclusively public function. (Exhibit D).

12. On May 30, 1975, the Internal Revenue Service disallowed the claim for refund. (Exhibit E).

Cause of Action

13. The Airport and Airway Revenue Act of 1970, Public-Law 91-258, added § 4491 to the Internal Revenue Code of 1954. Under § 4491, a use tax was to be assessed on "taxable civil aircraft," a term which § 4492(a) defines, in part, as "any engine driven aircraft - . . . registered, or required to be registered, under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401(a))1 . . ." As an aircraft registered under 49 U.S.C. § 1401, the state police helicopter comes within the scope of the statutory definition of "taxable civil aircraft." Thus, by operation of these statutes, a federal tax is imposed on the use of the state police helicopter by the Commonwealth of Massachusetts.

14. The imposition of a tax on the use of property owned by the Commonwealth of Massachusetts and employed in the furtherance of public purposes violates the constitutional doctrine of intergovernmental tax immunity. Section 4491 is therefore unconstitutional as applied to the state police helicopter.

Relief Requested

Wherefore, the plaintiff respectfully requests that this Court:

15. Declare 26 U.S.C. § 4491 unconstitutional as applied to property of the Commonwealth of Massachusetts used for exclusively governmental purposes.

16. Order the Internal Revenue Service to refund all monies, with interest, collected from the Commonwealth of Massachusetts pursuant to § 4491.

17. Grant such additional and further relief as the Court deems appropriate.

By their attorneys,
FRANCIS X. BELLOTTI
Attorney General
TERENCE P. O'MALLEY
Assistant Attorney General

Dated: September 22, 1975

Exhibit A

DEPARTMENT OF THE TREASURY

DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE
Date: March 20, 1974.
In reply refer to: Twiss

Commonwealth of Massachusetts, Department of Public Safety
1010 Commonwealth Ave.
Boston, Massachusetts 02215
Attn: Capt. Kelly
Fiscal Division

Year or Period Ended:	June 30, 1971
Tax Form Number:	4638 Aircraft Use Tax
Tax:	$131.43
Interest:	26.75
Penalty:	25.22
Balance Due:	$183.30

We have previously written you requesting payment of the balance due on your tax account identified above, but we have no record of receiving it.

We urge you to immediately send what you owe, payable to Internal Revenue Service. The enclosed envelope is for your convenience.

We look forward to hearing from you within the next few days.

Sincerely yours,

ROBERT M. TWISS
Revenue Officer

Exhibit B

1010 Commonwealth Avenue
Boston, Massachusetts 02215
April 2, 1974

Mr. Robert M. Twiss
Revenue Officer
Director of Internal Revenue
John F. Kennedy Building
Boston, Massachusetts

Re: Mass. SP Helicopter Tax
Tax Form # 4638 (6/30/71)

Dear Mr. Twiss:

Your letter of March 20, 1974 is acknowledged. Please be advised that it is the position of this Department, notwithstanding the provisions of the Internal Revenue Code, the State Police helicopter is used solely for a governmental function. As such, Congress has no power to assess taxes on State government (see Ambrosini v. U.S. 197 U.S. 1, Willcuts v. Bunn 232 U.S. 216). Kindly forward a copy of your ruling.

This Department has been further advised by the Attorney General of Massachusetts on March 23, 1973, that such a tax is unconstitutional and should not be paid.

Kindly refer all future correspondence and telephone inquiries to the Office of the Attorney General, State House, Boston, Massachusetts.

Very truly yours,

FRED L. LAMSON
Deputy Commissioner

Exhibit C

FORM 668-A
(Rev. Feb. 1967) April 26, 1974

U.S. TREASURY DEPARTMENT — INTERNAL REVENUE SERVICE

Notice of Levy

TO: First National Bank of Boston
100 Federal St.
Boston, Massachusetts

Originating District
Boston, Massachusetts

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of $183.30

Tax Form No.	*Period Ended*	*Date of Assessment*
4638	06-30-71	11-06-70

Identifying No.	*Unpaid Balance of Assessment*	*Statutory Additions*
04-6002284N	131.43	26.65 int. 25.22 pen.
TOTAL AMOUNT DUE		$183.30

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

ROBERT M. Twiss
Revenue Officer
Boston, Massachusetts

(Name and Address of Taxpayer)

Commonwealth of Massachusetts
Department of Public Safety
1010 Commonwealth Ave.
Boston, Massachusetts 02215

Certificate of Service

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME

TITLE

DATE AND TIME

SIGNATURE OF REVENUE OFFICER

Exhibit D

FORM 843 — Director's Stamp (Date received)

Claim

The Internal Service will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of amount paid for stamps unused, or used in error or excess.

☐ Abatement of Tax Assessed (Not Applicable to Income, Estate or Gift Taxes).

Name of taxpayer or purchaser of stamps
Commonwealth of Massachusetts (Department of Public Safety)
Number and street
1010 Commonwealth Avenue
City or town, State, and ZIP code
Boston, Massachusetts 02215

Fill in applicable items — Use attachments if necessary

a. Your social security number

Wife's number, if joint return

b. Employer identification number (if any)
04-6002284N
c. Internal Revenue Service office where return (if any) was filed
Boston, Mass.

d. Name and address shown on return, if different from above

---

e. Period — if for tax reported on annual basis, prepare separate form for each taxable year

From July 1, 1970 to June 30, 1971.

f. Kind of tax

Aircraft Use Tax (4683)

g. Amount of assessment

$ 131.43

Dates of payment

April 26, 1974 (Notice of Levy)

h. Date stamps were purchased from Government

i. Amount to be refunded (if income tax, complete computation below)

$ 183.30

j. Amount to be abated (not applicable to income, estate, or gift taxes)

$ 131.43

k. The claimant believes that this claim should be allowed for the following reasons:

The helicopter upon which this tax was assessed is used by the Commonwealth of Massachusetts, through the Department of Public Safety, exclusively for state police purposes. This is a unique state activity. The tax in question as applied to the Commonwealth of Massachusetts is therefore unconstitutional.

Computation of Income Tax Refund

	Income Tax
1. Tax withheld	_____
2. Estimated tax paid	_____
3. Tax paid with original return	_____
4. Any additional income tax paid	_____
5. Total tax paid (add lines 1-4)	_____
6. Less: Your computation of correct tax	_____
7. Amount of overpayment	_____
8. Amount previously refunded	_____
9. Net overpayment (enter in item 1 above)	_____

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete.

Terence P. O'Malley, Assistant Attorney General
373 State House, Boston, Massachusetts 02133

Dated ..... May 31, ..., 1974

Exhibit E

Internal Revenue Service
District Director

Date: 5-30-75

Commonwealth of Massachusetts
Dept. of Public Safety
1010 Commonwealth Ave.,
Boston, Mass. 02215

Department of the Treasury
P.O. Box 9107
Social Security or Employer Identification Number:
04-6002284
Document Locator Number:
74638-290-01100-0
Kind of Tax:
Civil Aircraft
Tax Period Ended:
July 31, 1970
Amount Claimed:
$131.43
Date Claim Received:
June 5, 1974
Person to Contact:
W. Pilotte
Contact Telephone Number:
223-7075

Gentlemen:

We are sorry, but we cannot allow the above claim for an adjustment of your tax, for the reasons stated below. Our decision is based on provisions of the internal revenue laws and regulations. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims, 717 Madison Place NW., Washington, D.C. 20005. The law permits

you to do this within 2 years from the mailing date of this letter. Suit may not be filed in the United States Tax Court.

If you have any questions, please contact the person named above.

Sincerely yours,

J. W. FORESTALL
District Director

Reasons for disallowance:
PER AUDIT DETERMINATION

United States District Court for the District of Massachusetts

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v. CIVIL ACTION No. 75-3987-G

UNITED STATES OF AMERICA,
DEFENDANT

Defendant's Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted

Defendant, the United States of America, by its attorney, James N. Gabriel, United States Attorney for the District of Massachusetts, respectfully moves this Court, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure to dismiss the complaint herein because of its failure to state a claim upon which relief can be granted.

The considerations and authorities in support of this motion are set forth in the attached memorandum.

JAMES N. GABRIEL
United States Attorney
By: WILLIAM A. BROWN
United States Attorney
Chief, Civil Division

Of Counsel:
DENNIS DONOHUE
Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-3640

[Certificate of service omitted in printing.]

[The Transcript of the Opinion of the District Court dated February 23, 1976, is printed in a separate appendix to the Petition for a Writ of Certiorari at pages (A-1) — (A-3).]

[The Judgment of the District Court dated March 26, 1976, is printed in a separate appendix to the Petition for a Writ of Certiorari at page (A-4).]

United States District Court
District of Massachusetts

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v. CIVIL ACTION No. 75-3987-G

UNITED STATES OF AMERICA,
DEFENDANT

Notice of Appeal

Notice is hereby given that the Commonwealth of Massachusetts, plaintiff in the above-entitled action, appeals to the United States Court of Appeals for the First Circuit from the judgment entered in this action on the 26th day of March, 1976.

By its Attorney,
TERENCE P. O'MALLEY
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
617-727-1014

[Certificate of service omitted in printing.]

[The Opinion of the Court of Appeals dated January 28, 1977, is printed in a separate appendix to the Petition for a Writ of Certiorari at pages (A-5) — (A-10).]

[The Judgment of the Court of Appeals dated January 28, 1977, is printed in a separate appendix to the Petition for a Writ of Certiorari at page (A-11).]

Supreme Court of the United States

No. 76-1500

MASSACHUSETTS,
PETITIONER,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed June 20, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

Supreme Court, U. S.
FILED
MAY 26 1977
MICHAEL RODAK, JR., CLERK

No. 76-1500

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1500

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOH A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner challenges the constitutionality of the federal excise tax imposed upon the use of civil aircraft by Section 4491 of the Internal Revenue Code of 1954 (26 U.S.C.), as applied to aircraft owned by petitioner and used for official purposes.[1] In this refund suit brought in the United States District Court for the District of Massachusetts,[2] the district court upheld the tax as a valid user

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[1]The aircraft in question in this case is a helicopter purchased by petitioner in 1969 for use by the Massachusetts state police. Petitioner registered it with the Federal Aviation Administration as a public use aircraft and uses it primarily to promote highway safety. In performing that function, it serves as an airborne command post and provides transportation in medical emergencies. On occasion, the helicopter is also used in searches for criminals and escapees from correctional facilities.

[2]Petitioner sought the return of $130 in tax (plus interest and penalties) (Pet. App. A-5).

charge for services rendered (Pet. App. A-1 to A-4). The court of appeals affirmed on the same ground, stating that " '[n]o logical reason exists why users of the air transportation system should not pay their fair share of such costs' " (Pet. App. A-5 to A-10, quoting from *State of Texas* v. *United States*, 30 A.F.T.R. 2d 5935, 5938 (W.D. Tex.), affirmed *per curiam*, 31 A.F.T.R. 2d 1473 (C.A. 5)).

1. Section 4491 of the Code was enacted in connection with the Airport and Airway Development and the Airport and Airway Revenue Acts of 1970, 84 Stat. 219, 236. These statutes provide for substantial expansion and improvement of the airport and airway system, to be financed in large measure "through the imposition and application of airport and airway user charges" (H.R. Rep. No. 91-601, 91st Cong., 1st Sess., p. 1 (1969)), including an annual excise tax imposed upon the use of taxable civil aircraft under Section 4491. See H.R. Rep. No. 91-601, *supra*, at 38; S. Rep. No. 91-706, 91st Cong., 2d Sess., p. 5 (1970). "Taxable civil aircraft" is defined by the pertinent Treasury Regulations as any engine driven craft registered or required to be registered with the Federal Aviation Administration, including "civil aircraft owned by the United States and State and local governments." See Section 4492 of the Code; Treasury Regulations, Section 154.3-1(b)(2) (26 C.F.R.), Appendix, *infra*, p. 4a; H.R. Rep. No. 91-601, *supra*, at 48-49.

The direct link between the Development Act and the excise tax here in issue was established by Section 208 of the Airport and Airway Revenue Act, 84 Stat. 250, which created the Airport and Airway Trust Fund. This fund was to be the depository of the proceeds of the various airport and airway user charges, from which the airport development expenditures were to be made. H.R. Rep. No. 91-601, *supra*, at 41. Since the user charge imposed under Section 4491 was "based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system" (H.R. Rep. No. 91-601, *supra*, at 40), Congress eliminated the exemptions previously granted to state and local governments and to the federal government, with respect to the companion excise tax on the transportation of persons by air (Section 4261 of the 1954 Code). Section 205(a)(2) and (3) of the Airport and Airway Revenue Act, 84 Stat. 238.

2. Petitioner argues (Pet. 4-5) that in upholding the validity of the federal aircraft use tax, the decision below: (1) undermines the principle of intergovernmental tax immunity; (2) conflicts with *National League of Cities* v. *Usery*, 426 U.S. 833; and (3) conflicts with *State of Georgia* v. *United States*, N.D. Ga., No. 75-1155A, decided April 13, 1977, in which the district court ruled that the tax was unconstitutional as applied to aircraft owned by the states.

a. As the court of appeals correctly observed (Pet. App. A-7), the federal aircraft use tax is "a charge for services rendered * * * and represents a quid pro quo, and * * * as such, is outside the scope of the doctrine of implied intergovernmental tax immunity" (quoting from *State of Texas* v. *United States*, *supra*, 30 A.F.T.R. 2d at 5938). These user taxes or "charges" are specifically earmarked for air transportation development, and are paid into the Airport and Airway Trust Fund established solely for that purpose. In particular, they are to be utilized in the development of airports, from the planning stages through construction, and for the planning, research, development, operation and maintenance of air traffic control, air navigation, communications, and supporting services for the airway system. These latter services, provided almost

exclusively by the Federal Aviation Administration, are available to all users of the airway system, whether public or private. Thus, in withdrawing the exemptions from the companion air transportation excise tax previously extended to various governmental and educational organizations, the House Committee Report stated that "since this tax is now generally viewed as a user charge * * * there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities." H.R. Rep. No. 91-601, *supra*, at 46. See also 114 Cong. Rec. 8987 (1968).

There is a fundamental difference between a tax that is designed to produce revenue to support general governmental activities, and a user charge which is designed to recoup part of the cost of governmental facilities and services directly from those who benefit from them. Thus, in substantially analogous cases, this Court has held that charges for services rendered by state and local governments for pilotage or wharfage, even though graduated by tonnage, do not violate Article II, Section 10, clause 3 of the Constitution, which provides that "[n]o State shall * * * lay any Duty of Tonnage." See, *e.g.*, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261; *Huse* v. *Glover*, 119 U.S. 543; *Packet Co.* v. *St. Louis*, 100 U.S. 423; *Packet Co.* v. *Keokuk*, 95 U.S. 80, 84. Cf. *The Minnesota Rate Cases*, 230 U.S. 352, 405. See also *Head Money Cases*, 112 U.S. 580, 595-596. Similarly, the Court has upheld state motor vehicle license and registration fees levied as compensation for the use of highway facilities furnished by the state. See, *e.g.*, *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542; *Aero Transit Co.* v. *Commissioner*, 332 U.S. 495; *Hendrick* v. *Maryland*, 235 U.S. 610.

Finally, the Court has sustained state and local enplaning charges upon commercial airline passengers as compensation for the use of state-provided airport facilities (*Evansville Airport* v. *Delta Airlines*, 405 U.S. 707), against the challenge that, because they were imposed upon vehicles or passengers in interstate as well as intrastate commerce, they impermissibly interfered with the former. As the Court stated in *Hendrick* v. *Maryland*, *supra*, 235 U.S. at 623-624, "there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."

Here, too, the annual excise tax on the use of civil aircraft is a payment by the user for airport and airway facilities and services furnished by the federal government. Accordingly, petitioner can no more claim the right to free use of these facilities and services than it could, for example, post its mail without purchasing stamps.

At all events, petitioner's claim that there is an implied constitutional immunity of the states and localities from federal taxation is seriously open to question. The Court originally recognized such an immunity in *The Collector* v. *Day*, 11 Wall. 113, except where the states engage in business of a private non-governmental character (see, *e.g.*, *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292 U.S. 360). But in *Helvering* v. *Gerhardt*, 304 U.S. 405, the Court sustained a federal income tax on salaries of employees of the bi-state Port of New York Authority. In so holding, the Court reaffirmed the distinction drawn by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, between the position of the national government (acting with powers of supremacy under the Constitution) and the states, which are not accorded such preeminent powers.

Similarly, in *New York* v. *United States*, 326 U.S. 572, the Court upheld a federal tax upon the sale of mineral water by the State of New York. While the case could have turned upon the distinction drawn in the earlier cases between governmental and private activities, none of the opinions of the members of the Court voting to sustain the tax rested upon that narrow ground. Rather, under the various tests suggested in the plurality opinions, the aircraft use tax at issue here would be valid.

Those tests are: (1) whether the tax is nondiscriminatory (326 U.S. at 582-584, Frankfurter, J.); (2) whether Congress expressly stated its intention that the tax apply to governmental organizations (*id.* at 584-586, Rutledge, J.); and (3) whether the tax unduly interferes with the performance of the sovereign functions of government, in the sense of actual impairment of state or city functions (*id.* at 586-590, Stone, C.J.). See also *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 843-844 and nn. 13, 14; *id.* at 863-864 (Brennan, J., dissenting); McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. Rev. 485, 493 (1973). It is therefore not surprising that shortly after the decision in *New York* v. *United States*, *supra*, one commentator concluded that "since the beginning of 1938, it is apparent that the Court has rejected the reciprocal rule of tax immunity, returned to the basis of earlier decisions and reaffirmed Chief Justice Marshall's understanding that immunity doctrine protected the Federal Government against taxation by the states but did not equally shield the states against the exercise of the delegated and supreme taxing power of the Federal Government." Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 Fed. Bar J. 3, 27 (1950).

b. Given the status of the aircraft excise tax as a user charge, this Court's decision in *National League of Cities* v. *Usery*, *supra*, does not control this case. There, the Court held that the 1974 amendments to the Fair Labor Standards Act that extended the Act's minimum wage and hour provisions to almost all employees of the states and their political subdivisions were unconstitutional. In so ruling, the Court concluded that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by * * * [the Commerce Clause]" (426 U.S. at 852). In the Court's view, "the vice of the Act as sought to be applied here is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose" (*id.* at 849).

Here, however, the imposition of a nondiscriminatory charge for the use of federally-improved airport facilities is not comparable to the imposition of federal wages and hours standards with respect to state and local government employment. By imposing this user charge, Congress sought to require that all aircraft using the national airway system, including the aircraft of the states, pay their proportionate share of the cost of improving and maintaining the essential airport facilities.

c. While we believe that the court of appeals correctly upheld the constitutionality of the federal aircraft use tax as applied to the states, we agree with petitioner (Pet. 5, 7-8) that the decision below conflicts with that of the district court in *State of Georgia* v. *United States*, *supra*. Since the district court held the statute unconstitutional as applied to the states, that decision can only be reviewed by direct appeal to this Court under 28 U.S.C. 1252. The

Solicitor General has authorized a direct appeal in the *State of Georgia* case and our appeal will be docketed shortly. Hence, the issue in this case warrants plenary consideration by this Court.[3] Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

[3]In order to provide for congressional review of the airport improvement program, the tax at issue in this case is due to expire after July 1, 1980 (see 26 U.S.C. 4491(e)). See S. Rep. No. 91-706, *supra*, at 3. However, the considerations underlying the constitutional question are equally applicable to the federal air passenger ticket excise tax provided by 26 U.S.C. 4261. See *City of New York* v. *United States*, 394 F. Supp. 641 (S.D. N.Y.), affirmed *per curiam*, 538 F. 2d 308 (C.A. 2), certiorari denied, October 4, 1976 (No. 75-1684).

DOJ-1977-05

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4491 [as added by Sec. 206(a), Airport and Airway Revenue Act of 1970, Pub. L. 91-258, 84 Stat. 236, 243]. IMPOSITION OF TAX.

(a) *Imposition of tax.*—A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

(1) $25, plus
(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.

(b) *By whom paid.*—Except as provided in section 4493(a), the tax imposed by this section shall be paid—

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or
(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

(c) *Proration of tax.*—If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection (a) (2) shall be reckoned proportionately

from the first day of the month in which such use occurs to and including the last day in such year.

(d) *One tax liability per year.*—

(1) *In general.*—To the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.

(2) *Cross reference.*—

For privilege of paying tax imposed by this section in installments, see section 6158.

(e) *Termination.*—On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

SEC. 4492 [as added by Sec. 206(a), Airport and Airway Revenue Act of 1970, *supra*]. DEFINITIONS.

(a) *Taxable civil aircraft.*—For purposes of this subchapter, the term "taxable civil aircraft" means any engine driven aircraft—

(1) registered, or required to be registered under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401(a)), or

(2) which is not described in paragraph (1) but which is owned by or for a United States person.

(b) *Weight.*—For purposes of this subchapter, the term "maximum certificated takeoff weight" means the maximum such weight contained in the type certificate or airworthiness certificate.

(c) *Other definitions.*—For purposes of this subchapter—

(1) *Year.*—The term "year" means the one-year period beginning on July 1.

(2) *Use.*—The term "use" means use in the navigable airspace of the United States.

(3) *Navigable airspace of the United States.*—The term "navigable airspace of the United States" has the definition given to such term by section 101(24) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1301(24)), except that such term does not include the navigable airspace of the Commonwealth of Puerto Rico or of any possession of the United States.

Temporary Regulations in Connection with the Airport and Airway Revenue Act of 1970 (1954 Code) (26 C.F.R.):

§ 154.3-1 *Tax on use of civil aircraft.*

(a) *Purpose of this section.* In general, section 4491 of the Internal Revenue Code of 1954, as added by the Airport and Airway Revenue Act of 1970, imposes a tax upon the use, at any time during the taxable period, of any taxable civil aircraft in the navigable airspace of the United States. This tax is imposed upon such use during any taxable period beginning on July 1, 1970, and on each subsequent July 1 before July 1, 1980. This section sets forth rules as to the general applicability of the tax and also sets forth rules, as authorized by section 4493(a), to provide a method whereby certain lessees of taxable civil aircraft may elect to be liable for the tax. Further, this section provides administrative provisions relating to the payment of tax and the filing of tax returns.

(b) *Definitions.*—(1) Use. The term "use" means use in the navigable airspace of the United States, as

defined in section 4492(c)(3), except that such term does not include use by a manufacturer, dealer, wholesaler, retailer, exporter, or importer of aircraft solely for demonstration, testing, or delivery purposes. Mere possession of a civil aircraft does not constitute "use."

(2) *Taxable civil aircraft.*—The term "taxable civil aircraft" means any engine powered aircraft which is either registered or required to be registered under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1401(a)) or which is owned by or for a U.S. person. Such term includes civil aircraft owned by the United States and State and local governments. Military aircraft and aircraft of the National Guard are not within the definition of taxable civil aircraft.

* * * * *

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1976

No. 76-1500

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Table of Contents.

Opinions below	1
Jurisdiction	2
Statute involved	2
Questions presented for review	3
Statement of the case	4
Summary of argument	6
Argument	8
I. Introduction: The statutory background.	8
II. Since the doctrine of intergovernmental tax immunity contains no exception for "user charges," the circuit court erred in refusing to apply the doctrine in this case.	14
III. Assuming arguendo that a "user charge" falls outside the scope of the tax immunity doctrine, the Commonwealth's State Police helicopter should nonetheless be immune from taxation because the aircraft registration tax is not a "user charge."	28
A. The registration tax cannot be classified as a "user charge" under the proper definition of that term.	28
B. The Secretary of Transportation, charged by Congress with reviewing the provisions of the Revenue Act, has rejected the "user" characterization of the aircraft registration tax as unsound.	38
IV. Contrary to the argument of the United States in the lower courts, the principle of intergovernmental tax immunity remains alive and well.	41
Conclusion	54

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CASES.

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U.S. 495 (1947) 33
Alabama v. King & Boozer, 314 U.S. 1 (1941) 46
Allen v. Regents, 304 U.S. 439 (1938) 17n, 47n
Ambrosini v. United States, 187 U.S. 1 (1902) 17n, 19n
Arnett v. Kennedy, 416 U.S. 134 (1974) 50n
Board of Trustees v. United States, 289 U.S. 48 (1933) 22n
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 45
Cannon v. New Orleans, 87 U.S. (20 Wall.) 577 (1874) 31n
Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950) 26n, 27n, 32, 33, 37
Chesapeake & Delaware Canal Company v. United States, 250 U.S. 123 (1919) 39
City of New York v. United States, 394 F. Supp. 641 (S.D. N.Y. 1975), aff'd per curiam, 538 F. 2d 308 (2d Cir.), cert. denied, 429 U.S. 825 (1976) 5, 23n, 24n, 52
Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) 24, 25, 26n, 27n, 30, 36
Collector v. Day, 78 U.S. (11 Wall.) 113 (1870) 15, 16n, 43, 45n
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Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) 32
Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72 (1939) 32n
Duckworth v. Arkansas, 314 U.S. 390 (1941) 32n
Educational Films Corp. of America v. Ward, 282 U.S. 379 (1931) 18n, 19n
Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972) 24, 26n, 27n, 30, 32n, 33, 36 et seq.
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Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974) 35, 36, 37
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 22n, 37
Gillespie v. Oklahoma, 257 U.S. 501 (1922) 45
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 16n, 18n, 19n, 45n, 46, 50
Graves v. Texas Co., 298 U.S. 393 (1936) 45
Gurley v. Rhoden, 421 U.S. 200 (1975) 47
Head Money Cases, 112 U.S. 580 (1884) 21n, 22n, 24n
Helvering v. Gerhardt, 304 U.S. 405 (1938) 15, 17, 18, 19n, 23n, 44, 46 et seq.
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Helvering v. Powers, 293 U.S. 214 (1934) 16n, 17n, 47
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Hendrick v. Maryland, 235 U.S. 610 (1915) 32
Huse v. Glover, 119 U.S. 543 (1886) 25n
Indian Motocycle Co. v. United States, 283 U.S. 570 (1931) 15, 17n, 19n, 44, 53

James v. Dravo Contracting Co., 302 U.S. 134 (1937) 18n, 19n, 46
Kent v. Dulles, 357 U.S. 116 (1958) 37
Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954) 47
Maryland v. Wirtz, 392 U.S. 183 (1968) 53
Massachusetts v. United States, 548 F. 2d 33 (1st Cir. 1977) 1, 14, 21, 22n, 31n, 41
Mayo v. United States, 319 U.S. 441 (1943) 17n, 19n, 27n
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 15, 21n, 33, 42, 43
Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) 16n, 18n, 19n, 46
Morf v. Bingaman, 298 U.S. 407 (1936) 31, 32
Murdock v. Pennsylvania, 319 U.S. 105 (1943) 20, 34n
National Cable Television Association v. United States, 415 U.S. 336 (1974) 34, 35, 36, 37, 41
National League of Cities v. Usery, 426 U.S. 833 (1976) 20n, 21n, 52, 53
New York v. United States, 326 U.S. 572 (1946) 17, 19n, 20, 21n, 22n, 24n, 49 et seq.
New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937) 45
Ohio v. Helvering, 292 U.S. 360 (1934) 17n, 19n, 48n, 49
Packet Co. v. Keokuk, 95 U.S. 80 (1877) 24, 25, 30
Panhandle Oil Co. v. Knox, 277 U.S. 218 (1928) 45
Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) 17n, 45
Sonzinsky v. United States, 300 U.S. 506 (1937) 28, 34
South Carolina v. United States, 199 U.S. 437 (1905) 16n, 17n, 48n, 49

State Board of Insurance v. Todd Shipyards Corp., 370 U.S. 451 (1962) 37
State of Georgia v. United States, No. 75-1155A (N.D. Ga. April 13, 1977) 6
State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942) 33
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 28, 34
Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) 39n
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Trinityfarm Construction Co. v. Grosjean, 291 U.S. 466 (1934) 19n
United States v. California, 297 U.S. 175 (1936) 53
United States v. City of Detroit, 355 U.S. 466 (1958) 46
United States v. LaFranca, 282 U.S. 568 (1931) 34
United States v. Railroad Co., 84 U.S. (17 Wall.) 322 (1872) 17n
United States v. Sanchez, 340 U.S. 42 (1950) 28, 34
United States v. Tax Commission of Mississippi, 421 U.S. 599 (1975) 34
Vicksburg v. Tobin, 100 U.S. 430 (1879) 24, 25, 30
Willcuts v. Bunn, 282 U.S. 216 (1931) 15, 16, 18, 44
Wilmette Park District v. Campbell, 338 U.S. 411 (1949) 17, 18, 19n

Constitutional and Statutory Provisions

United States Constitution
Article I, § 8, cl. 1 14n, 34
Article I, § 8, cl. 3 (Commerce Clause) 15, 21n, 26, 27, 28, 32, 33 et seq.
Article I, § 10, cl. 3 (Duty on Tonnage Clause) 15, 25, 28, 30, 31n
Article III 34n
Tenth Amendment 43
Fourteenth Amendment 50n
United States Code, Title 28 (1970)
§ 1254(1) 2
§ 1346(a)(1) 4
United States Code, Title 49 (1970)
§ 1301(24) 30
§ 1348 30
§ 1701 10
§ 1702 10
§ 1703 38n
§ 1712 10
§§ 1713-1716 10
§ 1713 30n
§ 1713(b)(2) 10
§ 1714(c) 10n
§ 1717 30n
§ 1720 10
§ 1742 10, 36n
Internal Revenue Code
§ 4041 19n
§ 4041(c) 11, 35n
§ 4041(g) 13
§ 4071 39n

§ 4261 22, 29n, 35n
§ 4261(a) 11
§ 4261(c) 11
§ 4271 11, 35n
§ 4272 11
§ 4481 13
§ 4483(a) 13n
§ 4491 2, 4, 8, 9n, 11, 13, 14 et seq.
§ 4492(c) 30
§ 4492(a)(1) 9n
§ 6331(b) 34n
§ 7422 4
Airport and Airway Development Act of 1970, Pub. L. No. 91-258, Title I, 84 Stat. 219, 49 U.S.C. §§ 1701 et seq. 9, 10, 11, 24n, 36n, 38, 39n
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§ 205, 84 Stat. 241 13
§ 206, 84 Stat. 242 9n
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In the Supreme Court of the United States.

OCTOBER TERM, 1976

No. 76-1500

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for the Petitioner

Opinions Below

The opinion of the United States District Court for the District of Massachusetts is not reported. The opinion of the United States Court of Appeals for the First Circuit is reported at 548 F. 2d 33.

Jurisdiction

The judgment of the court of appeals was entered on January 28, 1977. The petition for a writ of certiorari was docketed on April 28, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

The constitutionality of I.R.C. § 4491 is involved. Said statute provides

§ 4491. Imposition of tax.

(a) Imposition of tax.

A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of —

(1) $25, plus

(2)(A) in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3 1/2 cents a pound for each pound of the maximum certificated takeoff weight.

(b) By whom paid.

Except as provided in section 4493(a), the tax imposed by this section shall be paid —

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or

(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

(c) Proration of tax.

If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection (a)(2) shall be reckoned proportionately from the first day of the month in which such use occurs to and including the last day in such year.

(d) One tax liability per year.

(1) In general.

To the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.

(2) Cross reference.

For privilege of paying tax imposed by this section in installments, see section 6158.

(e) Termination.

On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

The text of the statute is found at page 6999 of volume 6 of the United States Code (1970).

Questions Presented for Review

1. Whether the constitutional principle of intergovernmental tax immunity contains an exception for taxes

which are also designated as "user charges" or "user fees"?

2. Whether the federal excise tax on the use of civil aircraft can be appropriately designated as a "user charge" or "user fee"?

3. Whether the principle of intergovernmental tax immunity is presently valid and applicable to a direct tax on a State for the performance of a sovereign function?

Statement of the Case

On September 23, 1975, the Commonwealth of Masssachusetts commenced a civil action for refund of the federal excise tax on the use of civil aircraft (I.R.C. § 4491) in the United States District Court for the District of Massachusetts (A. 1, 6-19). As required by I.R.C. § 7422 in such an action, the named defendant was the United States of America (A. 7). Jurisdiction was based on 28 U.S.C § 1346(a)(1) (A. 6). The basic claim was that the imposition of the tax on the Commonwealth was a violation of the constitutional principle of intergovernmental tax immunity (A. 9).

The complaint recited the facts upon which the claim of immunity was based. The aircraft use tax was imposed on the use by the Commonwealth of a helicopter for public safety purposes. The helicopter, during the taxable year July 1, 1970, through June 30, 1971, was operated by personnel of the Massachusetts State Police, a division of the Department of Public Safety. The helicopter was also registered with the Federal Aviation Administration (No. N1 484W) as a public use aircraft (A. 7). The complaint detailed the public safety uses:

> The state police helicopter is primarily used to promote highway safety. In the course of performing that function it serves as an airborne command post, effects emergency evacuations in cases of personal danger and provides transportation in medical emergencies. The helicopter is also used to promote other public safety functions such as assisting in searches for criminals and escapees from correctional facilities. (A. 7-8.)

The Commonwealth thus declined to pay the tax of $131.43 demanded by the Internal Revenue Service (A. 8).

On April 26, 1974, the Internal Revenue Service levied funds of the Commonwealth held by the First National Bank of Boston. The amount of $183 collected in this manner included the tax, interest and penalty for the period July 1, 1970 through June 30, 1971 (A. 8, 13-14). The Commonwealth filed a claim for a refund, which claim was disallowed on May 30, 1975 (A. 8, 18-19).

The United States filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted (A. 19-20). The district court allowed the motion to dismiss (A. 2). At the hearing on the motion, the court briefly stated its reasons for that action (Pet. A.1-A.3). With respect to the claim of immunity from taxation, the court merely incorporated by reference the opinion in *City of New York* v. *United States*, 394 F. Supp. 641 (S.D. N.Y. 1975), *aff'd per curiam*, 538 F. 2d 308 (2d Cir.), *cert. denied*, 429 U.S. 825 (1976). That opinion stated that prior decisions of this Court invalidating federal taxes on immunity grounds were "of but historical interest." 394 F. Supp. at 644. The district court also held that since the revenue from the tax was earmarked for the expansion of

the air transportation system, the tax was a user fee (Pet. A. 2). This point was not, however, expanded upon. The Commonwealth then appealed to the circuit court of appeals. The court affirmed the judgment of the district court but only on the user fee basis (Pet. A. 6). The court was of the view that the tax was permissible because "[t]he revenue raised by this charge is applied directly to benefit those who must pay the charge" (Pet. A. 8). The court did not, however, address the implications of the principle of intergovernmental tax immunity.

The Commonwealth then petitioned this Court for a writ of certiorari. The United States responded with a memorandum which stated that the immunity issue warranted plenary consideration by this Court. The articulated basis for this concurrence was the apparent conflict between the decision of the court of appeals and a decision sustaining a claim of immunity against the aircraft use tax in *State of Georgia* v. *United States*, No. 75-1155A (N.D. Ga. April 13, 1977). (Memorandum for the United States 7-8.) This court granted the petition (A. 22).

Summary of Argument

1.

The federal excise tax on the use of civil aircraft is one of a series of taxing measures provided for in the Airport and Airway Revenue Act of 1970. The revenue derived from these measures is used to finance an ongoing system of airport planning and development grants. Massachusetts challenges the excise tax only as it is applied to the use of the State Police helicopter for public safety purposes.

2.

The federal government has enumerated powers and the states have reserved powers under our constitutional system of government. The principle of intergovernmental tax immunity is premised upon this foundation of dual sovereignty. Thus no one government is permitted to interfere with the performance of the other by imposing direct taxes upon the performance of a sovereign function. There is no recognized exception to this principle for taxes which are also designated as "user charges." The circuit court applied such an exception without directly addressing the implications of state sovereignty in any meaningful way. Rather, the circuit court made a summary comparison between the aircraft use tax and various charges adjudicated in other constitutional contexts. The cases dealing with duties on tonnage and undue burdens on interstate commerce relied upon by the circuit court do not govern or even illuminate the tax immunity issue squarely presented in this case.

3.

Were a "user charge" designation considered to have any bearing on the tax immunity issue, the aircraft use tax is not properly designated as a user charge. There is no direct correlation between the amount of the tax and the use of the navigable airspace or federally assisted airports. Since the issue presented is one of sovereignty, a rough approximation does not provide a sufficient basis for constitutional adjudication. The inappropriateness of the "user charge" designation is conclusively demonstrated by the Secretary of Transportation's determination, contained in a legislatively

mandated cost allocation study, that the aircraft use tax is unrelated to the amount of use of t[illegible]irway system.

4.

The principle of intergovernmental tax immunity has a solid constitutional foundation which has remained unshaken in the numerous opinions on the subject. There has, however, been some difficulty in its application to the plethora of tax contexts in which the issue has arisen. Thus the principle has occasionally been misapplied so as to immunize government employees and contractors doing business with the government. With respect to state immunity from federal taxation, the decision-making process has refined the principle so as to preclude a direct tax on the state for the performance of a sovereign function. The inescapable conclusion is that the federal excise tax on the use of civil aircraft may not be applied to the use of the State Police helicopter for public safety purposes.

Argument

I. Introduction: The Statutory Background

In this case the Commonwealth of Massachusetts challenges the application of a federal tax on the use of civil aircraft, I.R.C. § 4491,[1] to a helicopter owned by the

[1]Section 4491 reads in pertinent part:

(a) Imposition of tax.

A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of —

Commonwealth and used by its State Police in performance of police duties. To provide the proper framework for consideration of the Commonwealth's challenge, there follows a brief overview of the statutory scheme of which these taxing provisions are a part.

In 1970 Congress passed two statutes designed to improve the nation's airport transportation system: the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219, 49 U.S.C. §§ 1701 *et seq.* (1970) ("the Development Act"); and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236, I.R.C. § 4041 (1970) ("the Revenue Act").[2] The stated purpose of the Development Act was to promote "substantial expansion

(1) $25, plus

(2) (A) in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of $2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3 1/2 cents a pound for each pound of maximum certificated takeoff weight.

(b) By whom paid.

Except as provided in section 4493(a) [concerning payments by lessees], the tax imposed by this section shall be paid —

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or

(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

The helicopter used by the State Police is a "taxable civil aircraft" within the meaning of I.R.C. § 4492(a) (1), namely, an "engine driven aircraft . . . registered . . . under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401 (a)) . . . ."

[2]The Development Act appears as Title I of Pub. L. No. 91-258; the Revenue Act is Title II. The aircraft use or registration tax at issue here, appearing in I.R.C. § 4491, was enacted as part of the Revenue Act, *see* Pub. L. No. 91-258, Tit. II, § 206, 84 Stat. 242 (1970).

and improvement of the airport and airway system . . . to meet the demands of interstate commerce, the postal service, and the national defense." 49 U.S.C. § 1701. To effect this purpose, the Act directed the Secretary of Transportation to formulate a national transportation policy, *id.*, § 1702, and prepare a national airport system plan, *id.*, § 1712. More specifically, it established an ongoing system of airport planning and development grants to be awarded by the Secretary of Transportation to applicant states, state agencies, or local governments according to distribution formulas set forth in the statute and based primarily on population and area. *See id.*, §§ 1713-1716.[3] The federal share of these airport development projects is generally limited to 50 per cent of the "allowable project costs" (also defined in the Act, *see id.*, § 1720); the federal share of the planning projects may extend to two-thirds of the project's cost. *Id.*, § 1713(b)(2).

The Revenue Act — of more direct relevance to this case — is designed to produce the funds necessary for financing and implementing the Development Act's provisions. *See* H.R. Rep. No. 91-601, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3047, 3082 (hereinafter cited as House Report). It respectively creates and increases several new and existing excise taxes, and establishes in addition an Airport and Airway Trust Fund[4] in which the tax monies are to be held. 49 U.S.C. § 1742.

[3]There is also provision for a more limited award of grants for "acquiring, establishing and improving air navigation facilities." 49 U.S.C. § 1714(c).

[4]The Airport Trust Fund is modeled after the long-established Highway Trust Fund. *See* Act of June 29, 1956, c. 462, Title II, § 209, 70 Stat. 397.

The specific tax measures included in the Revenue Act are the following: (1) an increase in the existing tax on commercial passenger tickets from five to eight per cent of the ticket amount, *see* I.R.C. § 4261(a); (2) a new international flight departure tax of $3 per passenger, *see id.*, § 4261(c); (3) a new tax of five per cent on air freight waybills, *see id.*, §§ 4271, 4272; (4) an increase in the existing aircraft gasoline tax to seven cents per gallon and a new tax of seven cents per gallon on other types of aviation fuel, *see id.*, § 4041(c); and (5) the new annual aircraft use or registration[5] tax of $25 per aircraft plus an additional amount based on the aircraft's weight, *see id.*, § 4491. The passenger and air freight taxes apply solely to commercial aircraft, while the gasoline and fuel taxes are imposed only on noncommercial aircraft. The registration tax in issue here is imposed on both commercial and noncommercial aircraft.

The legislation which became the Development and Revenue Acts was originally proposed as a package to Congress by the President. *See* House Report, *supra*, *reprinted in* [1970] U.S. Code Cong. & Ad. News at 3047-48, 3082. However, once introduced in Congress, the package was split up. The airport planning and development portions of the original proposal, later to become the Development Act, were considered by the Committee on Interstate and Foreign Commerce of the House of Representatives. *See id.* at 3047, 3080-81. The original revenue portions, ultimately enacted in the Revenue Act, were

[5]Section 4491 imposes a tax on the "use" of any taxable civil aircraft. The Ways and Means Committee of the House of Representatives, which drafted this provision, consistently describes the measure as a "registration" tax. *See* H.R. Rep. No. 91-601, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3047, 3082, 3085. The terms are used interchangeably in this brief.

considered by the House Ways and Means Committee.[6] *Id.* The divergent paths which these measures followed in the House stemmed from their different characters and the distinct jurisdictions of the concerned House Committees. As recognized by both Committee chairmen, the Ways and Means Committee was required to handle the revenue provisions of the legislation "in accordance with its jurisdiction over tax matters," while provisions relating to expansion and improvement of the nation's airport system were properly within the Interstate and Foreign Commerce Committee's domain.[7]

In reporting on the Revenue Act provisions, the Ways and Means Committee characterized the various excise taxes included in the Revenue Act as "user taxes," intended generally to increase the share of airport development costs contributed by the air system's users. *See* House Report, *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3082, 3083. However, the only specific connection drawn by the Committee between this "user" concept and tax exemptions for state governments was directed not at the registration tax but at the commercial passenger tax; the Committee deleted the previously existing exemption granted governmental units from this tax. *See id.* at

[6]The President's proposed legislation included the commercial passenger and airfreight taxes and noncommercial gasoline and fuel taxes. It did not include the annual aircraft use tax. *See* Staff Report of Joint Committee on Internal Revenue Taxation, 91st Cong., 2d Sess., Summary of Recommendations on Air User Taxes 2 (Comm. Print 1970).

[7]Letter of Wilbur D. Mills, Chairman, Committee on Ways and Means, to Hon. Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, dated October 16, 1969, *included in* House Report, *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3081; *see* letter of Harley O. Staggers to Honorable Wilbur D. Mills, dated September 8, 1969, *included in id.* at 3080-81.

3090-3091. Congress accepted the deletion. Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, Title II, § 205, 84 Stat. 241 (1970). At the same time, the Committee, and later Congress, continued in effect the state government's exemption for the aircraft fuel tax. *See* I.R.C. § 4041 (g). As to the new aircraft registration tax, while neither the Committee nor ultimately Congress exempted state governments from its effect, the Committee's report never discussed the issue. Rather, its principal comments about the registration tax stressed that the tax was the only excise tax imposed on the air carriers themselves, and was "based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system." House Report *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3085. The Committee also described the aircraft use or registration tax as being similar in concept and operation to the highway use tax imposed under I.R.C. § 4481 on heavy trucks.[8] *See* House Report *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3082, 3092, 3094.

Of the several taxing provisions included in the Revenue Act, the only one which the Commonwealth challenges in this case is the application of the aircraft use or registration tax, I.R.C. § 4491.[9] It has consistently taken the position that, as applied to the helicopter used by the State Police, this tax violates the implied immunity of a state government from federal taxes which interfere with the state's exercise of its sovereign functions.

[8]Given this intended similarity between the highway use tax and the aircraft tax, it is noteworthy that Congress has exempted state and local governments from imposition of the highway tax. *See* I.R.C. § 4483(a).

[9]As noted above, see p. 13, *supra*, the Commonwealth is exempt from the fuel taxes included in the Revenue Act — the only other taxes applicable to noncommercial aircraft.

II. Since the Doctrine of Intergovernmental Tax Immunity Contains No Exception for "User Charges," the Circuit Court Erred in Refusing to Apply the Doctrine in this Case.

The circuit court never reached the issue whether the aircraft use or registration tax established by the Revenue Act, I.R.C. § 4491, violated the principle of intergovernmental tax immunity as set forth by this Court. *Massachusetts* v. *United States*, 548 F. 2d 33, 35, 36 (1st Cir. 1977). While not disputing that the registration tax constituted an exercise of the Congress' taxing power,[10] the circuit court nevertheless determined that the tax immunity doctrine was not applicable because in its view the tax itself was in the nature of a "user charge" rather than a general tax, and, as such, outside the doctrine's scope. *Massachusetts* v. *United States*, *supra*, 548 F. 2d at 35-6.

The circuit court's analysis of the intergovernmental tax immunity doctrine was in error. It attempted to (1) carve out of the Internal Revenue Code a special category of taxes, to be known as user charges; (2) exempt such taxes from the principle disfavoring a direct federal tax on the

[10] As discussed more fully above, see pp. 11-13, *supra*, the legislative history of the tax plainly establishes art. I, § 8, cl. 1, of the Constitution as the underlying basis for the registration tax. The Revenue Act was considered by the House Ways and Means Committee, and not the Interstate and Foreign Commerce Committee, because it was recognized that only Ways and Means had jurisdiction over these taxing measures. H.R. Rep. 91-601, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3047, 3080-81. Although the legislative report accompanying the Revenue Act occasionally characterized the registration tax as a user "charge" or "fee," *see id.* at 3085, the report's additional and repeated reference to it as a tax (*see id.* at 3082, 3085, 3092-94) suggests that Congress viewed a "user charge" merely as a specific type of tax. The placement of the registration tax statute in the Internal Revenue Code supports this conclusion.

property of state government used within the state's traditional and essential sphere of activity; and (3) support this new user charge exception to the intergovernmental immunity principle by reference to cases concerning tonnage duties and wharfage fees, as well as the Commerce Clause. This approach is without historical precedent or logical foundation. In the long line of cases considering the doctrine of intergovernmental tax immunity, this Court has not once referred to a Congressional exercise of the taxing power as a user charge or user tax, much less applied the term in its constitutional analysis. Nor has the Court ever introduced into its consideration of tax immunity questions the separate concerns and doctrines applicable to constitutional prohibitions on state tonnage duties, U.S. Const. art. I, § 10, cl. 3, or the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. An examination of the principles underlying the immunity doctrine and the contrasting concerns of the other constitutional provisions explains the reasons for the analytic path the Court has followed in the immunity field, and demonstrates the error of the circuit court's decision.

The principle of intergovernmental tax immunity sets forth the limitation or prohibition implicitly contained in the United States Constitution on the power of the state or national government to tax one another, or to tax the agencies, means, or instrumentalities which the other level of government employs to carry out its sovereign functions. *E.g.*, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819) (Marshall, C.J.) (instrumentalities of federal government immune from state taxes); *Collector* v. *Day*, 78 U.S. (11 Wall.) 113, 128 (1870) (state and its instrumentalities exempt from federal taxes); *see Helvering* v. *Gerhardt*, 304 U.S. 405, 411 (1938); *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575 (1931); *Willcuts* v. *Bunn*, 282

U.S. 216, 224-25 (1931). The rule rests on the notion of sovereignty and the corollary need to protect from usurpation the integrity and independence of each of the two separate sovereignties in the federal system — the States and the United States. The dangers of intrusion are inherent in the fact that the taxing powers of the state and federal governments are operating within the same territorial limits. Nonetheless, each must be free to carry out its own sovereign functions in the appropriate sphere without undue interference from the other; the existence of unlimited authority in either the nation or the state (or both) to tax the other would necessarily prevent their essential coexistence.[11]

While the Court in its decisions has delineated firm boundaries on the reach of this immunity principle, to prevent immunity itself from thwarting the operation of dual federalism, these boundaries do not relate in any manner to the type or amount of tax at issue. The Court has long recognized that the state must have the freedom to perform its sovereign responsibilities without undue interference from the federal taxing power; however, the federal taxing power itself cannot be curtailed as to effectively impair its essential functioning.[12] In order to give structure to the necessary task of reconciling these competing interests in each case — and limit a state's claim of tax immunity to its proper function — the Court has developed two funda-

[11] *See, e.g., Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939); *Helvering* v. *Therrell*, 303 U.S. 218, 223 (1938); *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 523 (1926); *Collector* v. *Day*, *supra*, 78 U.S. (11 Wall.) at 125-27.

[12] *See Metcalf & Eddy* v. *Mitchell*, *supra*, 269 U.S. at 523-24; *Willcuts* v. *Bunn*, *supra*, 282 U.S. at 225; *Helvering* v. *Powers*, 293 U.S. 214, 225 (1934); *South Carolina* v. *United States*, 199 U.S. 437, 454-55, 463 (1905).

mental guidelines to determine whether the application of a tax to a particular governmental entity or person is constitutionally permissible.

The first guideline looks at "the nature of the function being performed by the state or in its behalf, exclud[ing] from the immunity activities thought not to be essential *to the preservation of state governments* even though the tax be collected from the state treasury." *Helvering* v. *Gerhardt*, *supra*, 304 U.S. at 419 (emphasis added). *See Wilmette Park District* v. *Campbell*, 338 U.S. 411, 419 (1949); *New York* v. *United States*, 326 U.S. 572, 590 (1946) (opinion of Stone, C.J.).[13] The second focuses on

[13] As discussed in Argument IV, *infra*, it is through application of this criterion that the Court has consistently held a state's conduct of commercial activities — indistinguishable from private analogues — to be outside the scope of the immunity doctrine and, accordingly, subject to a variety of federal taxes. *See, e.g., Allen* v. *Regents*, 304 U.S. 439, 449-53 (1938) (federal admissions tax on tickets to state university athletic contests); *Helvering* v. *Powers*, 293 U.S. 214, 227 (1934) (income tax on trustees of public railway); *Ohio* v. *Helvering*, 292 U.S. 360, 371 (1934) (excise tax on sellers of state-owned liquor); *South Carolina* v. *United States*, 199 U.S. 437, 463 (1905) (license tax on sellers of state-owned liquor); *see also New York* v. *United States*, *supra*, 326 U.S. at 575, 580-81, 582 (opinion of Frankfurter, J.); 584-85 (opinion of Rutledge, J.); 586 (opinion of Stone, C.J.) (tax on state's sale of mineral waters).

On the other hand, the Court has long affirmed the right of the states to carry on their essential sovereign functions unhindered by federal taxes. *See, e.g., United States* v. *Railroad Co.*, 84 U.S. (17 Wall.) 322, 333 (1872) (income from investments of a municipality not subject to federal tax); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 585-86 (1895) (private investor's income from state bonds exempt from federal tax to protect state's borrowing power); *Ambrosini* v. *United States*, 187 U.S. 1, 7-8 (1902) (federal stamp taxes may not be applied to bonds required under state liquor regulatory scheme); *Indian Motocycle Co.* v. *United States*, *supra*, 283 U.S. 570, 579 (federal sales tax may not be applied to sale of police equipment to municipality). *Cf. Mayo* v. *United States*, 319 U.S. 441, 447 (1943) (fertilizer used in federal farm program not subject to state inspection fees).

the identity of the taxpayer and its relationship to the state's sovereign interests: if the tax is imposed on an individual rather than the state or one of its agencies, thereby affecting the state only insofar as the taxpayer passes the actual tax burden on, immunity will ordinarily not be granted; the controlling factor is the legal incidence of the tax rather than its economic consequences. *Helvering* v. *Gerhardt*, *supra*, 304 U.S. at 419-20. *See Wilmette Park District* v. *Campbell*, *supra*, 338 U.S. at 419; *Willcuts* v. *Bunn*, *supra*, 282 U.S. at 225.[14]

By their own terms these two criteria make no mention of "user charges" or of the general nature or amount of the tax at issue. Nor, as the cited cases make plain, does application of the criteria turn in any way on such considerations. On the contrary, the Court's tax immunity decisions affirmatively demonstrate that both the type of tax imposed[15] and

[14] Again, as further discussed in Argument IV, the Court has applied this criterion to deny immunity from income or other kinds of tax to state and federal employees, *see*, *Helvering* v. *Gerhardt*, *supra*, 304 U.S. 405; *Graves* v. *New York ex rel. O'Keefe*, *supra*, 306 U.S. 466; to contractors performing government contracts, *see e.g.*, *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *Metcalf & Eddy* v. *Mitchell*, *supra*, 269 U.S. at 514; to corporations benefiting from film royalties, *see e.g.*, *Educational Films Corp. of America* v. *Ward*, 282 U.S. 379 (1931); to lessees of state lands receiving profits from oil and gas produced on the lands, *see e.g.*, *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938); to sellers of government bonds receiving profits on the sale, *see Willcuts* v. *Bunn*, *supra*, 282 U.S. 214; to a park district for beach admissions taxes absorbed by the beach patrons, *see Wilmette Park District* v. *Campbell*, *supra*, 338 U.S. 411.

[15] With the exception of the lower courts' decisions in the present case and *Texas* v. *United States*, 72-2 U.S. Tax Cas. ¶ 16,048 (W.D. Tex. 1972), *aff'd*, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973) (discussed below; see pp. 23-24, *infra*), no case concerning application of the intergovernmental tax immunity doctrine has been found which considered

its amount[16] are simply irrelevant to the question whether the tax immunity doctrine applies in a particular case.

the kind of tax — "user charge" or any other — to be a pertinent, much less controlling, factor. The wide variety of taxes which have been at issue in the immunity cases of the Court support this conclusion. *See*, *e.g.*, *Wilmette Park District* v. *Campbell*, *supra*, 338 U.S. 411 (admission tax); *Mayo* v. *United States*, *supra*, 319 U.S. 441 (inspection fees); *New York* v. *United States*, *supra*, 328 U.S. 572 (sales tax); *Graves* v. *New York ex rel. O'Keefe*, *supra*, 306 U.S. 466 (state income tax); *Helvering* v. *Gerhardt*, *supra*, 304 U.S. 405 (federal income tax); *Educational Films Corp. of America* v. *Ward*, *supra*, 282 U.S. 379 (corporate franchise tax); *James* v. *Dravo Contracting Co.*, *supra*, 302 U.S. 134 (tax on gross receipts); *Trinityfarm Construction Co.* v. *Grosjean*, 291 U.S. 466 (1934) (gasoline excise tax); *Ohio* v. *Helvering*, *supra*, 292 U.S. 360 (flat exercise tax of $25 and $100 on retail and wholesale liquor dealers).

The similarity between the gasoline excise tax at issue in the *Trinityfarm* case and the aircraft gasoline tax established by the Revenue Act, *see* I.R.C. § 4041, is noteworthy. In addition, it is difficult to distinguish on substantive grounds the excise tax imposed on liquor dealers in *Ohio* v. *Helvering*, *supra*, from the annual aircraft use or registration tax at issue here. Yet neither of these two cases touched upon the "user charge" concept in the course of analysis.

[16] *See e.g.*, *Indian Motocycle Co.* v. *United States*, *supra*, 283 U.S. at 575 ("[w]here the principle [of intergovernmental tax immunity] applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute"); *accord*, *Trinityfarm Construction Co.* v. *Grosjean*, *supra*, 291 U.S. at 471. *See also e.g.*, *Ambrosini* v. *United States*, *supra*, 187 U.S. 1 (federal stamp tax of 50 cents could not be applied to state liquor bonds).

That the character of the state instrumentality being taxed and the function it is performing are the controlling factors — and not the amount of federal tax imposed — is made clear in *Metcalf & Eddy* v. *Mitchell*, *supra*, 269 U.S. at 524: "the nature of the governmental agencies . . . may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that *any* taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power" (emphasis supplied). *Accord*, *Helvering* v. *Gerhardt*, *supra*, 304 U.S. at 424.

There are strong reasons why these factors have had no bearing on the immunity doctrine. As stated, the historic and consistent purpose of the rule has been to preserve the ability of both state and national governments to perform their "sovereign functions of government" without undue interference from the other. *New York* v. *United States*, 326 U.S. 572, 587 (1946) (opinion of Stone, C.J.). The inquiry recognizes that the idea of sovereignty, at its core, is not susceptible to compromise. Unlike the Court's assessment of the states' role in interstate commerce, balancing burdens and benefits will not do.

Turning to the facts of this case, if the control of the state over its police function is to be preserved in the sense contemplated by the framers,[17] immunity cannot be made to turn on the burden imposed on the state by a federal tax nor the benefit a state might be said to receive from federal grants or federal regulation. These benefits were to have been an intrinsic part of federalism; they cannot now be made conditional on the payment of an otherwise impermissible tax. *Cf. Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943).[18]

[17] For example, writing in the *Federalist Papers*, Alexander Hamilton asserted that the federal Constitution was only a "partial union or consolidation," whereby the states retained "all the rights of sovereignty which they before had, and which were not . . . exclusively delegated to the United States." *The Federalist Papers*, 80 (R. Fairfield ed. 1961).

[18] In *Murdock*, the Court held invalid a license tax on solicitation of funds and the sale of merchandise as applied to distribution of religious literature. Answering the argument that the tax was a kind of use tax, the Court said that the "tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the Federal Constitution." *Id.* In a similar fashion, the power of the Commonwealth to carry out its sovereign functions is derived solely from the Constitution and not from federal authority. *Cf. National League of Cities* v. *Usery*, 426 U.S. 833, 840-52 (1976).

Moreover, resolution of the question whether a particular type or amount of tax "unduly interferes" with a state's exercise of its sovereign functions would lead the Court into an area where principled standards are virtually nonexistent.[19]

The circuit court in its opinion avoided consideration of these governing criteria and declined to discuss any of this Court's decisions which have considered the tax immunity doctrine. Instead, it reached its novel conclusion that the doctrine has no application to a "user" tax, primarily by reliance on *Texas* v. *United States*, 72-2 U.S. Tax Cas. ¶ 16,048 (W.D. Tex. 1972), *aff'd*, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973), and cases upholding wharfage and other types of service fees imposed on private carriers using publicly-owned wharves or other transportation facilities. *Massachusetts* v. *United States*, *supra*, 548 F. 2d at 35-6.[20]

[19] *Compare New York* v. *United States*, *supra*, 326 U.S. at 581 (opinion of Frankfurter, J.) ("[a]ny implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges"), *with id.* at 590 (opinion of Stone, C.J.) ("[s]ince all taxes must be laid by general, that is, workable, rules, the effect of [state] immunity on the national taxing power is to be determined not quantitatively but by its operation and tendency in withdrawing taxable property or activities from the reach of federal taxation"). *See McCulloch* v. *Maryland*, *supra*, 17 U.S. (4 Wheat.) at 430; *cf. National League of Cities* v. *Usery*, *supra*, 426 U.S. at 850-52 (state's power to determine its employees' wages an "undoubted attribute of state sovereignty" on which the federal exercise of power under the Commerce Clause could not directly impinge; resolution of actual monetary effect of federal legislation found unnecessary).

[20] The court also cited *New York* v. *United States*, *supra*, 326 U.S. 572, and *Head Money Cases*, 112 U.S. 580 (1884), which do not fit

The reliance is misplaced, for the cases cited by the circuit court fail to support its decision.

Turning first to *Texas* v. *United States, supra*, that case concerned the validity of another of the taxes imposed under the Revenue Act — the eight per cent excise tax added to commercial airline tickets. *See* I.R.C. § 2461. Texas claimed that, as applied to state employees traveling

within this category. While the *New York* case does concern the principle of state immunity from federal taxation — specifically, the question whether New York State's sale of its mineral waters as soft drinks was subject to a federal excise tax — no opinion turns or even touches on the type of tax at issue. *See* 326 U.S. at 573 (Frankfurter, J.), 584 (Rutledge, J.), 586 (Stone, C.J.), 590 (Douglas, J.). Nor do the more general views on the scope and limitations of the immunity doctrine expressed by the Justices in that case consider the character of a tax to be a relevant factor; certainly no opinion suggests that a user-oriented tax would *ipso facto* lie outside the reach of the intergovernmental immunity principle.

The *Head Money Cases, supra*, involved a passenger fee, or duty, charged private owners of vessels bringing foreign immigrants into United States ports, and collected into a fund to be used for the benefit of the immigrants. As stated by the Court, the statute was enacted not under the Congressional taxing authority but under its plenary power to regulate foreign commerce and immigration. *Head Money Cases, supra*, 112 U.S. at 591, 595-96. By contrast, as mentioned above, the circuit court never questioned in this case that the aircraft registration tax at issue was enacted under Congress' taxing power (see p. 14, and n. 10, *supra*); its only concern was with the type of tax the registration fee represented. *Massachusetts* v. *United States, supra*, 548 F. 2d at 35-6. Moreover, the plenary nature of Congressional power over interstate commerce must be considered. Independent of all the other distinctions between the *Head Money Cases* and this case, the fact that they involved regulation of foreign commerce renders them inapposite. *See Board of Trustees* v. *United States*, 289 U.S. 48, 56-7 (1933) (reach of the intergovernmental tax immunity principle does not extend to foreclose a duty enacted under Congressional power over foreign commerce); *see also Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824). *Cf. Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976).

on official business, the tax was constitutionally prohibited by the doctrine of intergovernmental tax immunity. The district court rejected the argument, concluding, as quoted by the First Circuit in its decision below, that the excise tax was

> 9. . . . a charge for services rendered and represents a quid pro quo, and as such, is outside the scope of the doctrine of implied intergovernmental tax immunity. *New York* v. *United States*, 326 U.S. 572 (1946); *Head Money Cases, supra*; *Packet* v. *Keokuk*, 95 U.S. 80 (1877).
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> 10. Nothing in the historical basis of dual sovereignty underlying the principle of [redacted] immunity from federal taxation requires that the states continue to receive the benefit of airway facilities and services actually used by the states but furnished by the Federal Government without bearing their equitable share of the costs incurred in providing those particular benefits. . . . *Texas* v. *United States, supra*, 72-2 U.S. Tax Cas. ¶ 16,048, at p. 86, 131. [11]

[11] The Texas district court first characterized the passenger excise tax as an exercise of the Congressional power over interstate commerce. *Texas* v. *United States, supra*, 72-2 U.S. Tax Cas. at p. 86,131. The First Circuit in the present case made no reference to this portion of the *Texas* opinion. The Texas court also concluded that even if the excise tax were considered as a "tax within the general confines of the doctrine of implied intergovernmental tax immunity" it would still be valid as a nondiscriminatory measure that did not impose an undue burden on the state's exercise of its governmental function. *Texas* v. *United States, supra*, at p. 86,131. Massachusetts agrees that the passenger excise tax, imposed as it is on individual state employees rather than directly on the state or one of its agencies, would appear to be valid under the reasoning of *Helvering* v. *Gerhardt, supra*, 304 U.S. at 420-22, 424. *See City of New York* v. *United States*, 394 F. Supp. 641, 646 (S.D. N.Y. 1975),

The quoted paragraphs from the *Texas* opinion encompass that court's entire treatment of the question whether "airway user charges" are outside the intergovernmental tax immunity doctrine. Given the conclusory nature of this analysis, and the failure of any of the three cases cited by the Texas court to support its conclusion that the tax immunity doctrine was inapplicable,[11] *Texas* v. *United States* cannot be viewed as validating the circuit court's decision here.

Nor is the circuit court's decision any better aided by its strained attempt to analogize the aircraft registration tax to the wharfage or port regulation fees at issue in *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935); *Vicksburg* v. *Tobin*, 100 U.S. 430 (1879); and *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877), or the aircraft passenger taxes discussed in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972). The fees in each of these cases were imposed by city ordinance or state agency regulation as a charge for providing wharfage, harbor, or airport service and protection. In each case the sole issue was whether such fees constituted a prohibited duty of tonnage, or, as applied to private concerns doing interstate business, an impermissible burden on interstate commerce. These are wholly separate questions from those implicated by the doctrine of intergovernmental tax immunity. Their resolution in favor of the fees adds

aff'd per curiam, 538 F. 2d 308 (2d Cir. 1976), *cert. denied*, 429 U.S. 825 (1976). As is clear by its direct exaction from the state treasury, the same cannot be said for the aircraft registration fee challenged here. Moreover, no consideration was given to the fact that the states or their political subdivisions must match the federal grants under the Development Act. *See* Argument I, *supra*, p. 10.

[11] See pp. 21-22, n. 20, *supra*, for a discussion of *New York* v. *United States* and the *Head Money Cases* in this context. The lack of relevance of *Packet Co.* v. *Keokuk* is examined below, pp. 24-26, *infra*.

nothing to the inquiry whether a federal tax purporting to be user-oriented can be applied constitutionally to a state-owned helicopter used for police work.

With regard to the tonnage cases, see *Clyde Mallory Lines* v. *Alabama*, *supra*; *Vicksburg* v. *Tobin*, *supra*; *Packet Co.* v. *Keokuk*, *supra*; *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851), it is clear that they are *sui generis*. Each case posed the question whether a particular municipal wharfage or harbor fee fell within the scope of the constitutional prohibition against a state's laying "any duty of tonnage." United States Constitution, art. 1, § 10, cl. 3. From *Cooley* v. *Board of Wardens* forward, in every case the Court answered by reference to the meaning of a "duty of tonnage" at the time the Constitution was adopted, concluding that the framers as well understood the term to signify something separate from wharfage fees or pilotage charges.[13] Accordingly, since in every case the challenged fees were found to represent compensatory charges for wharfage or port services offered by the local government, they were upheld.[14]

The tonnage cases thus make plain that a "duty of tonnage" is a term of art with a special, historically-defined meaning. As a result of that history, the cases are inapposite; the Court's upholding certain user-oriented fees assessed by local governing bodies against private companies under art. 1, § 10, of the Constitution clearly has no

[13] *See, e.g.*, *Cooley*, *supra*, 53 U.S. (12 How.) at 314; *Packet Co.* v. *Keokuk*, *supra*, 95 U.S. at 85, 87-8; *Clyde Mallory Lines* v. *Alabama*, *supra*, 296 U.S. at 265-66, 267; *see also Huse* v. *Glover*, 119 U.S. 543, 549-50 (1886).

[14] *Cooley* v. *Board of Wardens*, *supra*, 53 U.S. (12 How.) at 314-15; *Packet Co.* v. *Keokuk*, *supra*, 95 U.S. at 88; *Huse* v. *Glover*, *supra*, 119 U.S. at 540-50; *Clyde Mallory Lines* v. *Alabama*, *supra*, 296 U.S. at 267.

bearing on the question whether a federal registration tax on aircraft can be applied to the Commonwealth's police helicopter under the rule of intergovernmental tax immunity.

Similarly, Commerce Clause cases relied on by the circuit court (and the government below) also concern user-oriented taxes or charges imposed by state or local governing bodies on private concerns.[25] In each, the Court upheld the assessment against a challenge that it impermissibly burdened interstate commerce. Again, however, the focus of the Court's analysis was entirely different from that required in the present case.

A state tax on interstate commerce, to be valid, must, in a broad sense, be a user charge: such a tax is permissible only as it represents a nondiscriminatory scheme to compensate the state for the use of its roads or other travel services, and specifically to help defray the state's expenses in providing these services.[26] Thus, in assessing the validity of such a tax, the Court must ask whether it (1) discriminates against those engaged in interstate as compared with the intrastate commerce; (2) reflects a fair approximation of use of the facilities; (3) represents a reasonable, nonexcessive compensation for the services offered; and (4) does

[25] *See, e.g., Evansville-Vanderburgh* v. *Delta Airlines, Inc., supra,* 405 U.S. 707 (use and service charge on all passengers emplaning at a state airport); *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542 (1950) (state tax on common carriers imposed as charge for using state highways); *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 261 (harbor fees charged for mooring and shifting services and for generally policing the port).

[26] *See e.g., Evansville-Vanderburgh* v. *Delta Airlines, Inc., supra,* 405 U.S. at 714; *Capitol Greyhound Lines* v. *Brice, supra,* 339 U.S. at 543-44; *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 267-68.

not conflict with any federal policies furthering uniform national regulation.[27]

These questions bear no relationship to the inquiry, described above, which application of the intergovernmental tax immunity doctrine requires. Massachusetts does not question either the power of Congress to enact a user-oriented tax as a means of defraying the costs of airport development, or the validity of the airport registration tax itself.[28] Its sole objection is, rather, to the imposition of this tax on a state helicopter used for official police work — *i.e.*, to a specific application of an otherwise valid tax — on the basis that it unduly interferes with the Commonwealth's performance of its fundamental and necessary sovereign duties. Nothing in the Commerce Clause cases cited by the circuit court meets this challenge.[29]

In sum, by declining to consider any of this Court's prior decisions on intergovernmental tax immunity, and by viewing the taxing measure at issue here through the

[27] *Evansville-Vanderburgh* v. *Delta Airlines, Inc., supra,* 405 U.S. at 716-21; *Capitol Greyhound Lines* v. *Brice, supra,* 339 U.S. at 544; *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 267.

[28] The Commonwealth does dispute, however, the circuit court's determination that the registration tax itself qualifies as a user-oriented tax or "user charge." *See* Argument III, *infra.*

[29] This point is graphically illustrated by comparing the Court's decision in *Clyde Mallory Lines* v. *Alabama, supra,* 296 U.S. at 267-68, with a more recent governmental tax immunity case, *Mayo* v. *United States, supra,* 319 U.S. at 447-48. In upholding the harbor fees against a challenge under the Commerce Clause in *Clyde Mallory Lines,* the Court stated that the fees were similar to "inspection or license fees incident to or in support of local regulations of interstate commerce," *id.* at 268, which had consistently been approved. Nevertheless, in *Mayo,* the Court held that such fees, while presumably valid as applied to private parties, may not constitutionally be imposed against the federal government under the doctrine of intergovernmental tax immunity.

ill-fitting lens of the Duty on Tonnage and Commerce Clauses, the circuit court fashioned an exception to the tax immunity doctrine wholly without precedent or support. Whether or not the aircraft registration assessment is deemed to be a "user charge" designated to defray the federal cost of airport development, its origin and character plainly identify it as an exercise of Congressional taxing power. *Cf. United States* v. *Sanchez*, 340 U.S. 42, 44-5 (1950); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 393 (1940); *Sonzinsky* v. *United States*, 300 U.S. 506, 513-14 (1937). As such, an asserted imposition of the tax on state property used in performance of traditional police work necessarily raises the question whether the application is prohibited by the implied principle of intergovernmental tax immunity. The circuit court's conclusion that it need not consider this question was erroneous and should be reversed.

III. Assuming Arguendo that a "User Charge" Falls Outside the Scope of the Tax Immunity Doctrine, the Commonwealth's State Police Helicopter Should Nonetheless be Immune from Taxation Because the Aircraft Registration Tax is Not a "User Charge."

A. *The Registration Tax Cannot be Classified as a "User Charge" Under the Proper Definition of that Term.*

The circuit court found that its characterization of the aircraft tax as a "user charge" was dispositive of the Commonwealth's claim of immunity, but offered little analytic support for its use of the label. Although the court relied heavily on cases in the commerce and wharfage

fee area, it made no attempt to identify and analyze the separate elements of the taxes in those cases which were deemed to justify the "user charge" classification. Nor did the court analyze whether any of these elements, although pertinent in determining permissible state burdens on shipping or interstate commerce, might be inappropriate in their application to intergovernmental tax immunities.[30] The lack of attention to framework is particularly problematic in this instance, since the court was dealing with a case of first impression for any circuit.[31]

When subjected to analysis, application of the "user charge" sobriquet to the aircraft tax proves open to attack. Although the issue is not free from doubt, it is incumbent upon the Court — in recognition that questions of state sovereignty are at stake here — to resolve those doubts in favor of immunity.

As a starting point, rather than discussing the generally accepted differences between taxes and fees, the court of appeals upheld the use tax largely on the basis of a strained and inappropriate analogy to wharfage fees charged to

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[30] The previous section of this brief presented the argument that the characterization of a tax as a "user charge," in its totality, has no bearing on the issue of state immunity from federal taxation. Here, in contrast, the Commonwealth argues that certain of the discrete elements of "user charges" are inapposite to consideration of the tax immunity principle even assuming the pertinence of the overall user charge concept.

[31] This is so despite the prior decision in *Texas* v. *United States*, 72-2 U.S. Tax Cas. ¶ 16,048 (W.D. Tex. 1972), *aff'd*, 73-1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973), relied on substantially by the circuit court below. The *Texas* case dealt with the application of the tax immunity principle to a different portion of the Revenue Act — the passenger excise taxes set forth in I.R.C. § 4261. Apparently, because both taxes were part of the Revenue Act — although the passenger tax antedated the Act — the circuit court assumed, without analysis, that the taxes were equivalent. As Part I establishes, these taxes are different in origin and application.

vessels using publicly owned wharves. On occasion, this Court has sustained such charges as not coming within the scope of the constitutional prohibition against duties on tonnage. U.S. Const. art. 1, § 10, cl. 3. Such fees have been upheld as charges for the support and maintenance of wharfage facilities justifiably enacted by the owners of such facilities. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935); *Vicksburg* v. *Tobin*, 100 U.S. 430 (1879). The fact that the owners of the wharves were public agencies did not deprive them of rights incident to such ownership. "[W]hen compensation is demanded for the use of the wharf, the demand is an assertion, not of sovereignty, but of a right of property." *Packet Co.* v. *Keokuk*, 95 U.S. 80, 85 (1877).

The aircraft use tax cannot be sustained under the rationale that it is a right of property, rather than an assertion of sovereignty. Section 4491 is a tax on the use of navigable airspace. *See* I.R.C. § 4492(c). The United States is not the proprietor of the navigable airspace. Rather, the United States, through the Federal Aviation Administration, defines and regulates such airspace. 49 U.S.C. §§ 1301(24), 1348 (1970). *Cf. Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 720-21 (1972). Regulation,[31] however, is not

[31] The designation of the revenue for airport development and expansion does not transform the United States into a proprietor for purposes of analyzing the aircraft use tax. That revenue is distributed in the form of grants to public agencies that do own airports. 49 U.S.C. § 1713. Thus, even when the focus is shifted from the regulation of navigable air space to the ownership of airport facilities, the user fee characterization remains incorrect. The proprietor of the airport is the State or its political subdivision. While the public agency is the possible recipient of financial assistance, that agency must match the federal grant generally to the extent of 50 per cent. 49 U.S.C. § 1717. Thus, in light of the State's own contribution, when its aircraft uses an airport which has received federal funds, it is unfair to suggest that a claim of tax immunity constitutes avoidance of financial responsibilities with respect to federally-assisted improvements. This misconceived consideration appears to have motivated the court of appeals. *Massachusetts* v. *United States*, 548 F. 2d 33, 36 (1st Cir. 1977).

ownership, and the United States should not be permitted to tax Massachusetts' use of its own airport facilities for policing purposes on the assertion that the federal government owns the airways."

On a more general level, it should be noted that the "user charge" label has been applied in the commerce area despite the Court's own recognition that, when treating fees like the aircraft registration tax, not related to actual use, the "user" concept is at best an ill-fitting one. Thus, in the leading case of *Morf* v. *Bingaman*, 298 U.S. 407 (1936), a flat permit fee levied by New Mexico on certain motor vehicles was upheld, but only through modification of a strict "user charge" rationale. Justice Stone wrote:

> We cannot say that these circumstances [highway safety hazards] do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways.

[32] *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577, 581 (1874), offers further support that Massachusetts' use of the airspace cannot, of itself, justify the federal tax in wharfage fee terms. The Court held that when an ordinance taxed the use of riverbanks and wharves indiscriminately, rather than the wharves built by the municipality, the exaction could no longer be justified as compensation for use of a wharf; the tax was struck down as a duty on tonnage — a tax prohibited to the states under art. I, § 10 — not a "user charge."

> *As the tax is not on the use of the highways but on the privilege of using them*, without specific limitation as to mileage, the levy of a flat fee . . . rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. 298 U.S. at 411-12 (emphasis added).

The court recognized that the "user" rationale was weakened since the state had made no effort to calibrate the amount of the charge according to degree of use of the highways.

Morf has been cited as the justification for all flat and other non-use oriented fees[34] subsequently challenged under the Commerce Clause, but over time the distinction in *Morf* between "privilege of use" charges and "user" charges has been obscured. *E.g.*, *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 544-45 (1950). This lack of precision in the commerce area, while explainable in its own context, is wholly inappropriate in the immunity area.

For interstate commerce purposes the "user" concept has traditionally served as a means of distinguishing permissible state charges levied on both intra- and interstate entities from invalid taxes on interstate entities alone. *Compare Hendrick* v. *Maryland*, 235 U.S. 610, 624 (1915), *with Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867). So

[34] *See, e.g.*, *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 545 (1950) (flat tax on all common carriers); *see also Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 715-17 (1972) (airport fee for each passenger emplaning on any commercial aircraft); *Duckworth* v. *Arkansas*, 314 U.S. 390, 395 (1941) (fee for transportation of intoxicating beverages across state); *Dixie Ohio Express Co.* v. *State Revenue Comm'n*, 306 U.S. 72, 76 (1939) (tax upon trucks and trailers used for hire).

long as the overall charge was not excessive, there was less need for close analysis of the "user" concept, and questions of a fair degree of congruence between charge and benefit were subordinated to the observation that, however ill-fitting the "user" definition, interstate commerce entities could not claim that their burden was disproportionate to intrastate entities. *See State Tax Comm'n* v. *Aldrich*, 316 U.S. 174, 182 (1942) (Frankfurter, J., concurring) (the limit on the state tax power imposed by Art. I, § 8, cl. 3, is that "no state tax so as to discriminate against interstate commerce"); *see also Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 714, 717 (1972); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495, 501-05 (1947); *cf. Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 544-45 (1950).

In the tax immunity area, the inappropriateness of these "rough approximations," *Capitol Greyhound Lines* v. *Brice*, *supra*, 339 U.S. at 546, as opposed to some more precise degree of calibration, should be plain. Fundamentally at issue in the tax area is the power of one level of government to control or suppress, through fiscal coercion, another government's full exercise of its sovereign powers. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Federal fees based upon "privilege of use"[35] — entry fees

[35] The legislative history of the aircraft registration tax shows that it was intended to be "an entry fee to use the [air] system," H.R. Rep. No. 91-601, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3047, 3085, (hereinafter cited as House Report) establishing its nature as a "privilege to use" levy in the view of Congress, rather than a "user charge." While the Court should not defer to Congress in determining whether its attempt to tax the state is constitutional, the Court may accept the definitional limits on the "user" concept that Congress itself intended to prescribe. *Compare Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 314 (1851) ("it is the thing, and not the name, which is to be considered") *with Trafficante* v. *Metropolitan Life Ins.*

unrelated to actual use — must not be permitted to apply to states, lest the federal government, through imposition of a tax, presume to exercise control over Massachusetts' ability to carry on effective law enforcement.[36] Hence, as in other areas where basic values demand special solicitude,[37] a closer scrutiny should be given the justification offered by the government for its taxing measure. When such scrutiny is afforded it becomes clear that the aircraft registration tax is precisely what its name states it to be — a tax — and cannot fairly be characterized as a user charge.

This Court has coined a standard definition for a tax. It is "an 'enforced contribution to provide for the support of government.'" *United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 606 (1975), *quoting United States* v. *LaFranca*, 282 U.S. 568, 572 (1931). The special regulatory or beneficent effects that may accompany the tax, and which may have impelled the Congress to act, do not in any way change its status as a proper revenue-raising exercise of the taxing power under art. I, § 8, cl. 1, of the Constitution. *United States* v. *Sanchez*, 340 U.S. 42, 42, 44-5 (1950); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 393 (1940); *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937). *See also National Cable Television Association* v. *United States*, 415 U.S. 336, 341 (1974).

Co., 409 U.S. 205, 212 (1972) (White, J., concurring) (Congress' classification of those entitled to sue entitled to weight in court's standing analysis under Article III).

[36] A sanction available to the United States for failure to pay the registration tax is seizure of the State Police helicopter. I.R.C. § 6331(b).

[37] *See e.g.*, *Murdock* v. *Pennsylvania*, *supra*, 319 U.S. at 115:

> A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike.

By contrast, a user charge, when imposed by the federal government, has been characterized as a reasonable charge made to a recipient for a "measurable unit or amount of Government service or property from which he derives a special benefit." *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345, 349 (1974).[38] As opposed to a tax which need establish no relation between payment and benefit, it is "the value to the recipient" which appropriately guides the measure of a user fee. *National Cable Television Association* v. *United States*, *supra*, 415 U.S. at 342-43.[39]

If these definitions are applied to this case, it is plain that the aircraft registration tax, unlike, perhaps, other elements of the Revenue Act,[40] must be considered a general tax and not a "user charge." The registration tax establishes a flat rate of twenty-five dollars per aircraft, plus additional levies

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[38] The Court was here quoting a circular issued in 1959 by the Bureau of Budget (now known as the Office of Management and Budget) describing a section of the Natural Gas Act, 31 U.S.C. § 483a, which the Court held to authorize a user fee but not the imposition of a flat "tax" uncorrelated to amount of actual use.

[39] Both the *National Cable* and *New England Power* cases concerned the power of federal agencies — the F.C.C. and F.P.C. — to impose levies under their regulatory statutes. The F.C.C. had imposed, *inter alia*, annual fees for each CATV system at the rate of 30 cents per subscriber. The F.P.C. imposed assessments on electric and gas companies based on their sales and deliveries, despite the statute's authorization of charges to recipients of energy service. The Court was concerned that the taxing power of Congress not be derogated by loose delegations of the taxing power to agencies. The court accordingly proceeded to read the two statutes as permitting only charges measured by benefits received.

[40] *See* I.R.C. §§ 4041(c) (tax on aviation fuel); 4261 (passenger tax); 4271 (transportation of property by air). These exactions are user-oriented in that they are imposed only when actually using the airport and airway system. Moreover, the amount of the exaction increases with more extensive use. *But see infra*, Part III B (suggesting that none of these taxes are user-oriented).

based on weight.[41] The exaction does not bear any relation to the degree of use than an aircraft may make of the nation's air system.[42]

The definitions of "user charge" employed by the Court in *National Cable, supra*, and *New England Power Co., supra*, are stricter than those employed, for example, in *Clyde Malloy Lines* v. *Alabama*, 296 U.S. 261, 265-66 (1935), and *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.* 405 U.S. 707 (1972), cited for support by the circuit court. Neither set of definitions has ever been considered or actually employed in the tax immunity area. This Court, if it accepts the "user charge" concept as a new dimension to the immunity doctrine, must therefore choose the definition and analysis of the term best suited to the tax immunity area.

The stricter standards articulated in *National Cable* and *New England Power Co.* are the more appropriate, because here, as with the levy of fees by the F.C.C. and F.P.C. in those cases, the essential dispute involves a direct clash between organs of government, with the resolution of the case bearing upon the prerogatives of both organs, diminishing the power of one as it increases that of the

[41] While Congress did note that heavier planes may require more extensive use of the air traffic control system, it made no attempt to coordinate its charges with the frequency with which such planes may use the system. House Report, *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3085, 3093. Moreover, the tax by weight was geared primarily to commercial carriers, with the justification that there would be a direct relation between the weight of the plane and the revenue it produced for the taxpayer. *Id.* at 3093.

[42] Moreover, the benefits realized through use of the monies collected under I.R.C. § 4491 are not limited to those who pay the tax. The revenues are channelled to the Airport and Airway Trust Fund. 49 U.S.C. § 1742. While the Trust Fund is intended to insure that all the excise taxes established under the Revenue Act are generally used for

other. In *National Cable* and *New England Power Co.*, the limitation on the federal agencies' authority to impose charges under their respective statutes was deemed necessary, *inter alia*, to prevent dilution of the basic constitutional precept that the legislative branch alone may levy taxes. The fundamental questions of power allocation at issue in the cases justified giving close scrutiny. *See National Cable Television Association* v. *United States, supra*, 415 U.S. at 341-42. *Cf. Kent* v. *Dulles*, 357 U.S. 116, 129 (1958).

Similarly, in this case, a strict view of the "user charge" label is necessary to prevent subordination of essential state functions to the federal taxing power.

In the interstate commerce area, the "user charge" cases implicated no such basic issues. It was beyond dispute that if at any time the Congress chose to override state levies on interstate commerce, either replacing or simply prohibiting them, it could do so under art. I, § 8, cl. 3, of the Constitution. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 187-97 (1824); *see Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines Inc., supra*, 405 U.S. at 721; *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962); *Capitol Greyhound Lines* v. *Brice, supra*, 339 U.S. at 547.

For these reasons the definitions of "user charges" adopted in *National Cable* and *New England Power Co.* should be applied here, and the circuit court's "user charge" rationale should be rejected, on its own terms, as inapplicable.

"expansion, improvement and maintenance of the air transportation system," House Report, *supra, reprinted in* [1970] U.S. Code Cong. & Ad. News at 3085, there is again no direct link made between the use of that system and payment of the tax. In addition, in enacting the Development and Revenue Acts, Congress was aware that the benefits of an expanded air transportation system would be enjoyed by many air system users who were not taxed (for example, the military), as well as citizens generally, regardless of whether they flew. *See id.* at 3049-50, 3051, 3052-53.

B. *The Secretary of Transportation, Charged by Congress with Reviewing the Provisions of the Revenue Act, has Rejected the "User" Characterization of the Aircraft Registration Tax as Unsound.*

In separate provisions in the Department and Revenue Acts, the Congress directed the Secretary of Transportation to study and report on the costs of the airport and airway system, and the appropriate allocation of these costs to ensure equitable distribution of the tax burden.[43]

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[43] Section 4 of the Development Act, 49 U.S.C. § 1703 (1970), provides in part:

> *Cost Allocation Study.* — The Secretary of Transportation shall conduct a study respecting the appropriate method for allocating the cost of the airport and airway system among the various users . . ..

Section 209 of the Revenue Act, Pub. L. No. 91-258, Tit. II, § 209, 84 Stat. 252, provides:

> (a) STUDY AND INVESTIGATION. — The Secretary of Transportation is hereby authorized and directed . . . to make a study and investigation to make available to the Congress information on the basis of which it may determine what revisions, if any, of the taxes imposed by the United States should be made in order to assure, insofar as practicable, an equitable distribution of the tax burden among the various classes of persons using the airports and airways of the United States or otherwise deriving benefits from such airports and airways.
>
> (b) REPORTS. — The Secretary of Transportation shall report to the Congress the results of the study and investigation required by subsection (a). The final report shall be made as soon as possible . . .. Each such report shall be printed as a House document of the session of the Congress to which the report is made. In addition, the Secretary of Transportation shall identify the costs to the Federal Government that should appropriately be charged to the system and the value to be appropriately assigned to the general public benefit.

The Secretary filed the first part of the study in September, 1973.[44] It has special status among executive studies; since it is the product of a Congressional mandate, its empirical findings and conclusions deserve special weight, if relevant, in this Court's deliberations on issues which can be illuminated by empirical data. *Cf.* Chesapeake & Delaware Canal Company v. *United States*, 250 U.S. 123, 128-29 (1919).

The Study begins by stating that the taxes called for by the Revenue Act were, together, "recognized as only an interim approach to an overall user charge system." Study, *supra*, at 11. Thus the Secretary's Study was an effort to extract from experience under the Act the basis for a sounder user-related revenue system. *Id.* As far as the weight and registration taxes combined in I.R.C. § 4491 were concerned, the Secretary concluded that "[t]hese taxes are unrelated to the amount of use of the system." *Id.* at 58 (as applied to noncommercial aviation); 57 (as applied to commercial carriers). Indeed, the Secretary criticized all the "user taxes" imposed under the Revenue Act[45] because

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[44] Its title is Airport and Airway Cost Allocation Study, Part I: Determination, Allocation, and Recovery of System Costs (U.S. Department of Transportation, Sept. 1973) (hereafter cited as "Study"). By its terms, the Study responds to the mandates of both § 4 of the Development Act and § 209 of the Revenue Act. *See* Study at 12. Agency studies such as this have been judicially noticed by this Court. *E.g.*, *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 332, n. 12 (1961).

[45] His criticism was directed also at the aircraft tire and tube sales taxes which antedated the 1970 Development and Revenue Acts. *See* I.R.C. § 4071.

they did "not adequately relate to system usage," *id.* at 56, and proposed that, in moving to a more permanent system, the existing structure should be changed so "that the charges paid by each individual user [would] be tied to the usage he imposes on the system and to the costs incurred on his behalf." *Id.*; *see id.* at 57-9 for potential "user fees"[46] that would effect a closer tie between levy and user.

The segment of the air system where the greatest divergence was found to occur between tax levy and amount of use is "general aviation" (noncommercial and nonmilitary aircraft) in which the State Police helicopter falls.[47] Study, *supra*, at 31-2, 43-50. In this category none of the taxes under the Act can truly be termed user charges, and the registration tax, since it is in no way related to amount of use of the aircraft or the air facilities financed with federal funds, is the most inequitable of the taxes now a part of the Act.

Thus, unless the "user fee" concept is to become a self-serving label planted by Congress in legislative history to override state sovereignty, the lack of factual foundation for applying the term to a particular tax must be addressed

[46] It is noteworthy that the Secretary characterized the levies established by the Revenue Act as "excise taxes," explicitly contrasting them to properly designed "user fees," which he believed would constitute a more equitable and efficient tax structure. Study, *supra*, at 60 and n. 1.

[47] "General aviation is a heterogeneous group. It covers a broad range of users, from the simplest 'homebuilts' to large turbine aircraft as sophisticated as any in the air turbine fleet. . . . Clearly, a general aviation pilot flying 'off the system' should not pay the same user charges as a general aviation pilot flying an identical aircraft on instruments in controlled (and costly) terminal air space. . . . [T]he present tax structure leads neither to an equitable distribution of the cost burden among the various users of the system nor to the needed incentives to use the system efficiently." Study, *supra*, at 49.

by the federal courts.[48] Such an inquiry compels a fact-gathering process. *See National Cable Television Association* v. *United States*, *supra*, 415 U.S. at 343-44. In adopting the user-fee concept, however, the circuit court chose not to look behind the label offered by the United States, and upheld the district court's allowance of its motion to dismiss. If this Court were to accept the "user charge" rationale, at a minimum, the circuit court should be reversed and the case remanded for trial on the question whether the registration tax is in fact user-related.

IV. Contrary to the Argument of the United States in the Lower Courts, the Principle of Intergovernmental Tax Immunity Remains Alive and Well.

The Commonwealth's prior arguments have sought to clear the field of newly asserted exceptions to the tax immunity doctrine. Once that task is completed, it remains to address the doctrine itself and its application to this case. In the proceedings below the United States took the position that the "theory of intergovernmental tax immunity . . . is for all practical purposes moribund if not obsolete[,] . . . a 'doctrine of questionable validity . . . .'" *Massachusetts* v. *United States*, 548 F. 2d 33, 34-5 (1st Cir. 1977). A review of the doctrine's development and recent treatment by the Court reveals, however, that the immunity principle never lost its essential vitality. When applied to this case, it precludes imposition of the aircraft registration tax.

The Constitution of the United States does not expressly provide for immunity from taxation. The national government is not specifically precluded from taxing the states, nor are the states, in terms, prohibited from taxing the national government. There has nevertheless persisted a continuous

[48] In Argument II, p. 21, and n. 19, *supra*, the Commonwealth has argued that the lack of manageable standards renders the user concept as a whole an unworthy addition to the tax immunity area.

judicial recognition that limitations on the taxing powers of each arise by necessary implication from the essential premises of the Constitution.[49]

The seminal opinion on the principal of intergovernmental tax immunity is *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which held that the operation of the national bank chartered by Congress was immune from taxation by the State of Maryland. Since the power to operate a national bank was within the scope of the enumerated powers delegated to the national government under the Constitution, a tax on such operation was held to infringe upon the sovereignty of the United States. This infringement was determined not by the amount of the tax but by the status of the central government under the Constitution. Speaking for the Court, Chief Justice Marshall stated:

[49] In regard to the specific problem of the federal taxing power, Hamilton declared that:

> Revenue is as requisite to the purposes of the local administrations, as to those of the union; and the former are at least of equal importance with the latter, to the happiness of the people. It is therefore as necessary, that the state governments should be able to command the means of supplying their wants, as, that the national government should possess the like faculty, in respect to the wants of the union. But an indefinite power of taxation in the *latter* might, and probably would, in time, deprive the *former* of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. (Emphasis in original.)

The Federalist Papers, 78 (R. Fairfield ed. 1961).

> We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. *McCulloch* v. *Maryland*, *supra*, 17 U.S. (4 Wheat.) at 430.

The constitutional principle of tax immunity was thus placed on a firm foundation.

The sovereign status of the individual states also provided the rationale for extending to them the principle of intergovernmental tax immunity. In *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1870), the Court held that Congress could not tax the salary of a state judicial officer. Noting that the central government is one of enumerated powers under the Constitution, the Court emphasized the states' retention of all other powers under the Tenth Amendment. The sovereignty of the states was thus a constitutional datum which warranted immunity from taxation, and the existence of dual sovereignties in the states and the central government under the Constitution made the immunity reciprocal:

> In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation: as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. *Collector* v. *Day*, *supra*, 78 U.S. (11 Wall.) at 127.

The numerous decisions in which claims of immunity have been adjudicated over more than a century reveal strong unifying themes in the evolution of the principle of intergovernmental tax immunity. The first and most important feature is that the fundamental concept of dual sovereignty has been uniformly recognized, from its earliest statement to the more recent cases reassessing the reach of the immunity doctrine. A representative judicial statement appears in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575 (1931):

> It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. . . .

See also: *Helvering* v. *Gerhardt*, 304 U.S. at 411; *Willcuts* v. *Bunn*, 282 U.S. at 224-25. At its core, then, the doctrine of intergovernmental tax immunity recognizes the necessity of protecting the freedom of both the states and central government to carry on their sovereign, governmental powers unimpaired by the other's conflicting exertions of taxing authority.

The difficulty with the principle has not been with this conceptual basis but with its application to particular circumstances; there are a wide variety of contexts in which the power to tax has resolved itself into a dispute between the central government and the states. In some instances, the results reached by the Court have stood the test of time. But in others, the Court has reversed prior cases, attempting to maintain the basic integrity of the tax immunity principle without seeing it used in such a way as to limit unduly the revenue-raising capacities of the federal government.[50]

These related developments occurred simultaneously and for the most part interchangeably with respect to both federal and state immunity. In the years following the establishment of the doctrine's reciprocal nature, the Court took a broad view of the immunity principle, and struck down a wide variety of state taxes under its guise. *E.g.*, *Gillespie* v. *Oklahoma*, 257 U.S. 501, 504-07 (1922) (state tax on income derived from lease of Indian lands); *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218, 222 (1928) (sales tax on gasoline dealer measured by volume sold to United States); *Graves* v. *Texas Co.*, 298 U.S. 393, 400-01 (1936) (gasoline storage tax on distributor measured by volume withdrawn upon sales to the United States); *New York ex rel. Rogers* v. *Graves*, 299 U.S. 401, 408 (1937) (state income tax on salaries of federal employees); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 583 (1895) (federal tax on income from municipal bonds); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 400-01 (1932) (federal tax on income from lessor of state lands).

---

[50] This basic rationale of dual sovereignty was not in any manner questioned when the Court later overruled the specific application of tax immunity in *Collector* v. *Day*, finding that salaries of state employees were subject to federal taxation. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939).

This expansive view of the principle of intergovernmental tax immunity was of relatively brief duration. As a clearer understanding of the interaction between the governments and those with whom it did business developed, the principle took on a more realistic cast. In *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9 (1941), the Court overruled prior precedent and held that the mere passing on of an economic burden to the government did not vitiate an otherwise nondiscriminatory tax. This ancillary principle also defeated a series of claims by contractors seeking tax immunity because of their business relations with the government. *E.g.*, *United States* v. *City of Detroit*, 355 U.S. 466, 475 (1958); *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 161 (1937); *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 526 (1926).

The immunity of government employees from income taxes also was abandoned. In *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), the Court sustained a federal income tax on employees of the New York Port Authority. Among the reasons stated by the Court was that there, as in the converse situation of state taxation, the economic incidence of the tax on the government was immaterial. "The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity." *Helvering* v. *Gerhardt*, *supra*, at 422. The logic of that opinion was later applied to uphold a state income tax on the salary of a federal employee. *Graves* v. *New York ex. rel. O'Keefe*, 306 U.S. 466, 487 (1939). These and like decisions provided a salutary limitation to the principle of intergovernmental tax immunity. On the one hand, vicarious immunity could not be claimed on the basis of economic incidence on the

government. *See Gurley* v. *Rhoden*, 421 U.S. 200, 204 (1975). On the other hand, the basic sovereignty of the government, whether central or state, was preserved as a positive constitutional value. The "decisions consistently prohibit taxes levied on the property or purchases of the Government itself." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 123 (1954) (footnote omitted).

A separate restriction imposed on the principle of state immunity from federal taxation relates to the nature of the activity engaged in by the state and which is subject to taxation. In *Helvering* v. *Powers*, 293 U.S. 214 (1934), the Court upheld imposition of federal income taxes on the state-appointed trustees of a publicly operated street railway. With respect to the claim of immunity, the Court stated:

> The principle of immunity thus has inherent limitations . . . [a]nd one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity. . . . The necessary protection of the independence of the state government is not deemed to go so far. 293 U.S. at 225.[51]

[51] The rejection of immunity in the *Powers* case is one example in a long line of decisions where the Court has declined to interfere with the application of federal taxing power to instances where the state was not engaging in an essential sovereign function. *See e.g.*, *Allen* v. *Regents*, 304 U.S. 439, 452 (1938) (federal admissions tax on tickets to university

By 1938, the principle of intergovernmental tax immunity had undergone a refinement process which enabled the Court to delineate the contours of state immunity:

> [J]udicial pronouncements . . . definitely establish . . . two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. . . . The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which may well be substantially or entirely absorbed by private persons. *Helvering* v. *Gerhardt*, 304 U.S. 405, 419-20 (1938).

Immunity was thus firmly predicated on the performance of a sovereign function and imposition of the tax on the state itself. *See generally*, Powell, *The Remnant of Inter-*

athletic contests); *Ohio* v. *Helvering*, 292 U.S. 360, 368 (1934) (excise tax on sellers of state-owned liquor); *South Carolina* v. *United States*, 199 U.S. 437, 461 (1905) (license tax on sellers of state-owned liquor).

governmental Tax Immunities, 58 Harv. L. Rev. 757 (1945). The basic tenet of dual sovereignty underlying the principle of intergovernmental tax immunity was maintained; indeed, the narrowing process may be said to have fortified the immunity principle, by avoiding the extravagance which, in the end, might have rendered it functionally untenable.

The delicate balance described in *Gerhardt* was jarred if not upset in the case of *New York* v. *United States*, 326 U.S. 572 (1946). The facts of the case did not require a reevaluation of the principle of immunity. The logic of sustaining a tax on the sale of mineral water by the state was plainly governed by prior decisions. *Ohio* v. *Helvering*, *supra*, 300 U.S. at 371, *South Carolina* v. *United States*, *supra*, 199 U.S. at 463. As Justice Frankfurter stated, in light of prior cases upholding taxes on the sale of liquor by a state, there was "no reason for putting soft drinks in a different constitutional category from hard drinks." *New York* v. *United States*, 326 U.S. at 575 (opinion of Frankfurter, J.). The difficulty arose when Justice Frankfurter attempted to go beyond the facts of the case, stating; "[T]here comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases." 326 U.S. at 575. After a review of the state immunity principle, he concluded that there is "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." 326 U.S. at 584. Only Justice Rutledge of the eight-member Court[*] joined in that opinion. Chief Justice Stone,

[*] Justice Jackson did not participate in the decision. The opinion of Justice Frankfurter leads off in the United States Reports, despite its minority status, because he was given the assignment of announcing the judgment of the Court.

speaking for four members of the Court, filed a separate opinion. The split among the majority occurred because these four members, as was of course true of the two dissenters, were "not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike." 326 U.S. at 586.[33] Chief Justice Stone expressed concern that a non-discriminatory tax may "when laid on a State, . . . nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government." 326 U.S. at 587. The Chief Justice thus focused on the essential element of dual sovereignty which had given rise to and sustained the principle of intergovernmental tax immunity. The nondiscriminatory nature of a tax was not, in his view, sufficient; a tax on the state was invalid "not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty." 326 U.S. at 587. This rationale was a precise reflection of the Court's prior opinions on tax immunity. *See, e.g., Helvering* v. *Gerhardt, supra,* 304 U.S. at 414; *Graves* v. *New York ex rel. O'Keefe, supra,* 306 U.S. at 477-78.

While speaking in terms of a new formulation, the separate opinion of Justice Frankfurter is itself grounded on state sovereignty. He, too, recognized that the Congressional power to lay taxes did not dispose of the immunity issue: "[b]ut the fact that ours is a federal constitutional

[33] The four Justices in the plurality and two in dissent thus constituted a majority on the issue of the doctrine's continued vitality. *Cf. Arnett* v. *Kennedy,* 416 U.S. 134 (1974) (concurring and dissenting opinions form a majority of six holding that the issue of what process is "due process" finds its source exclusively in the Fourteenth Amendment).

system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government." *New York* v. *United States, supra,* 326 U.S. at 575. One of these implications is a limited degree of tax immunity. He stated:

> There are, of course, state activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. [34] These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. 326 U.S. at 582.

This analysis reveals a basic acceptance of the concept of dual sovereignty, tempered by a federalist's concern for the unimpeded exercise of the Congressional taxing power. Even for Justice Frankfurter, the principal goal was that income earned by the state be available for federal taxation. 326 U.S. at 579. The split among the Justices can be traced to the narrow issue as to the tax treatment of revenue-creating activity by the state. The court would presumably have agreed that the levying and imposition of taxes by the states was immune from federal taxation.[35]

[34] And only a state can own a state police helicopter.

[35] *See,* Tucker and Rombro, *State Immunity From Federal Taxation: The Need for Re-examination,* 43 Geo. Wash. L. Rev. 501, 550 (1975).

However, the separate issues raised by the state engaging in other revenue-making areas do not in any way undermine the common rubric that the state may not be taxed when it is earning no income, but is carrying on the unique "business" of law enforcement.

The most recent statement of this Court on the issue of state immunity is found in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). While that case dealt with the power of Congress to regulate the activity of the state pursuant to the Commerce Clause, it bears unequivocal implications for the tax immunity issue. In striking down the application of the Fair Labor Standards Act to state and local employees generally, the Court acknowledged the continued validity of the principle of intergovernmental tax immunity and relied upon concepts of state sovereignty which transcend differences between commerce regulation and the taxing power. *Compare* Part II, *supra*.

With respect to the issue of tax immunity, the Court quoted directly from the opinion of Chief Justice Stone in *New York* v. *United States*, in which the notion of nondiscrimination as a basis for overriding state sovereignty was rejected. 426 U.S. at 843. This reference not only placed the *Usery* Court's stamp of approval on the four-member concurrence in *New York* v. *United States* but demonstrated that the principle of state immunity was no "aberration" in the continuum of constitutional history. *Contrast City of New York* v. *United States*, 394 F. Supp. 641, 644 (S.D. N.Y. 1975), *aff'd per curiam*, 538 F. 2d 308 (2d Cir.), *cert. denied*, 429 U.S. 825 (1976). The fact that the principle was implied from, rather than expressly stated in, the Constitution did not defeat its efficacy. "[T]his 'immunity' is derived from the sovereignty of the States and the concomitant barriers which such sovereignty presents to otherwise plenary federal authority." *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 843-44, n. 14.

The Court's Commerce Clause analysis directly supports the tax immunity claim of the Commonwealth. There, as here, the sovereignty of the states provides the underlying principle of decision. The Court referred to the "essential role of the States in our federal system of government," and stated that "[w]e have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress . . .." *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 844-45. The barrier imposed by sovereignty was measured, not by "particularized assessments of actual impact," 426 U.S. at 851, but by the state's power to structure its own governmental operations. The wage and hour provisions of the federal act could not be permitted to override the sovereignty of the states in that regard. 426 U.S. at 852.

In arriving at this decision, the Court overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), upholding application of the Fair Labor Standards Act to state schools and hospitals. The Court also disavowed language in *United States* v. *California*, 297 U.S. 175 (1936), which indicated that the principle of intergovernmental tax immunity had no analogy in the Commerce Clause area. That dictum was described as "simply wrong." *National League of Cities* v. *Usery*, *supra*. 426 U.S. at 855. Thus, the Court was of the firm conviction that state sovereignty was a constitutional value requiring judicial protection. It is significant that this position has consistently been recognized in the taxing area. *New York* v. *United States*, 326 U.S. 572, 575 (1946); *Indian Motocycle Co.* v. *United States*, 283 U.S. 570, 575 (1931). Its affirmation in the commerce area underscores the basic integrity of the constitutional foundation of state sovereignty.

The principle of intergovernmental tax immunity, as presently formulated, thus has an obvious application to the aircraft use tax imposed on the Commonwealth. The legal

incidence is on the state. The activity taxed is the performance of a sovereign function of protecting the public safety. The Commonwealth has not generated revenue from its use of the helicopter; there is thus no interference with the federal power to tax. The sovereignty of the Commonwealth demands that the application of the aircraft use tax to the Commonwealth's state police helicopter be enjoined.

Conclusion

For the reasons set forth above, the decision of the circuit court, affirming the district court's dismissal of the Commonwealth's complaint, should be reversed and the case remanded for further action consistent with the Court's opinion.

Respectfully submitted,

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P. 6, 15

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No. 76-1500

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	4
Argument	7
The federal excise tax upon the use of civil aircraft is constitutional as applied to aircraft owned by the states and used for official purposes	7
A. The federal civil aircraft use tax is a charge for the use of airports and airways	7
B. The decisions of this Court establish that a user charge for facilities provided or services rendered is not subject to the constitutional restrictions applicable to taxes	14
Conclusion	26
Appendix	27

CITATIONS

Cases:	
Aero Mayflower Transit Co. v. *Board of Railroad Commissioners*, 332 U.S. 495	6, 13, 17
Aero Mayflower Transit Co. v. *Georgia Public Service Commission*, 295 U.S. 285	13, 18

Cases—Continued

Capitol Greyhound Lines v. *Brice*, 339 U.S. 542 ---------- 5, 6, 13–14, 17, 18, 20
City of New York v. *United States*, 394 F. Supp. 641, affirmed, 538 F. 2d 308, certiorari denied, 429 U.S. 825---------- 3, 21–22
Clark v. *Poor*, 274 U.S. 554---------- 18
Clyde Mallory Lines v. *Alabama ex rel. State Dock Commission*, 296 U.S. 261--- 6, 16
Collector, The v. *Day*, 11 Wall. 113------- 22
Continental Baking Co. v. *Woodring*, 286 U.S. 352---------- 18
Evansville Airport v. *Delta Airlines*, 405 U.S. 707---------- 6, 18–20
Federal Power Commission v. *New England Power Co.*, 415 U.S. 345---------- 15
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466---------- 22
Head Money Cases, 112 U.S. 580----- 6, 15–16, 17
Helvering v. *Gerhardt*, 304 U.S. 405------ 22
Hendrick v. *Maryland*, 235 U.S. 610------ 6, 18
Hicklin v. *Coney*, 290 U.S. 169---------- 18
Huse v. *Glover*, 119 U.S. 543---------- 6, 16
Interstate Busses Corp. v. *Blodgett*, 276 U.S. 245---------- 18
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275---------- 24
Kane v. *New Jersey*, 242 U.S. 160-------- 18
McCarroll v. *Dixie Lines*, 309 U.S. 176---- 18
McCulloch v. *Maryland*, 4 Wheat. 316---- 22
Minnesota Rate Cases, The, 230 U.S. 352- 6, 16
Morf v. *Bingaman*, 298 U.S. 407--------- 13
National Cable Television Assn. v. *United States*, 415 U.S. 336---------- 15

Cases—Continued

National League of Cities v. *Usery*, 426 U.S. 833---------- 23, 25
NewYork v. *United States*, 326 U.S. 572-- 22–23
Ohio v. *Helvering*, 292 U.S. 360---------- 22
Oklahoma v. *Civil Service Commission*, 330 U.S. 127---------- 24
Packet Co. v. *Keokuk*, 95 U.S. 80------- 6, 16, 17
Packet Co. v. *St. Louis*, 100 U.S. 423----- 6, 16
South Carolina v. *United States*, 199 U.S. 437 ---------- 22
State of California v. *United States*, 77-2 U.S.T.C. ¶16,266, decided May 31, 1977 (E.D. Cal.)---------- 22
State of Georgia v. *United States*, 430 F. Supp. 823, appeal pending (No. 77-16)- 7, 25
State of Texas v. *United States*, 72-2 U.S.T.C. ¶16,048, decided July 11, 1972 (W.D. Tex.) affirmed *per curiam*, 73-1 U.S.T.C. ¶16,085, decided December 4, 1972 (C.A. 5)---------- 4, 12, 21
United States v. *San Francisco*, 310 U.S. 16 ---------- 24

Constitution, statutes, and regulations:

United States Constitution:
Article I, Section 8---------- 16
Article I, Section 10, clause 3------- 5–6, 16
Article VI---------- 22
Act of August 3, 1882, Section 1, 22 Stat. 214 ---------- 16
Airport and Airway Development Act of 1970, 84 Stat. 219, *et seq*---------- 7–8, 9
Section 2, 49 U.S.C. 1701---------- 8

Constitution, statutes, and regulations—Con.
Airport and Airway Development Act Amendments of 1976, Pub. L. 94–353, 90 Stat. 871, *et seq.*:
Section 6 ---- 19–20
Section 6(d), (e) ---- 20
Airport and Airway Revenue Act, 84 Stat. 236, *et seq.*:
Section 202 ---- 8, 14–15
Section 203 ---- 8
Section 204 ---- 8
Section 206 ---- 8
Section 208, 49 U.S.C. 1742 ---- 11
Section 208(f)(1)(A) and (B), 49 U.S.C. 1742(f)(1)(A) and (B) ---- 12, 19–20
Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq* ---- 12
Section 307, 49 U.S.C. 1348 ---- 12
Section 307, 49 U.S.C. 1348(b) ---- 20
Section 501(a), 49 U.S.C. 1401(a) ---- 2
Internal Revenue Code of 1954 (26 U.S.C.):
Section 4041 ---- 8
Section 4261 ---- 8, 10, 21
Section 4271 ---- 8, 21
Section 4491 ---- 2, 4, 5, 7, 8, 9, 13, 27
Section 4491(a) ---- 2, 27
Section 4492 ---- 2, 8, 28
Section 4492(a)(1) ---- 3, 28
Section 4492(c)(2) ---- 9, 29
Pub. L. 92–174, 85 Stat. 491–492 ---- 19
49 U.S.C. 1655(c) ---- 20

Constitution, statutes, and regulations—Con.
Temporary Regulations in connection with the Airport and Airway Revenue Act of 1970 (26 C.F.R.):
Section 154.3–1 ---- 2, 29
Section 154.3–1(b)(1) ---- 9, 30
Section 154.3–1(b)(2) ---- 3, 9, 30
Miscellaneous:
114 Cong. Rec. 8987 (1968) ---- 10
Hearings on Administration's Proposal on Aviation User Charges before the House Committee on Ways and Means, 91st Cong., 1st Sess. (1969) ---- 10
H.R. Rep. No. 91–601, 91st Cong., 1st Sess. (1969) ---- 3, 5, 8, 9, 10, 11, 12, 14
H.R. Rep. No. 94–594, 94th Cong., 1st Sess. (1975) ---- 10, 20
McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. Rev. 485 (1973) ---- 23
Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 Fed. Bar J. 3 (1950) ---- 23
Second Annual Report of Operations under the Airport and Airway Development Act, Department of Transportation (1971) ---- 20
S. Rep. No. 91–706, 91st Cong., 2d Sess. (1970) ---- 8, 10, 11, 14
United States Department of Transportation, Airport and Airway Cost Allocation Study (1973) ---- 13

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1500

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The oral opinion and written order of the district court (Pet. App. A-1 to A-4) are not reported. The opinion of the court of appeals (Pet. App. A-5 to A-10) is reported at 548 F. 2d 33.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1977 (Pet. App. A-11). The petition for a writ of certiorari was filed on April 28, 1977, and was granted on June 20, 1977 (A. 22). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the federal excise tax upon the use of civil aircraft is constitutional as applied to aircraft owned by the states and used for official purposes.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 4491 and 4492 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Section 154.3–1 of the Temporary Regulations in connection with the Airport and Airway Revenue Act of 1970 (26 C.F.R.), are set forth in the Appendix, *infra,* pp. 27–30.

STATEMENT

In 1969, petitioner Commonwealth of Massachusetts purchased a helicopter for use by its state police. Pursuant to Section 501(a) of the Federal Aviation Act of 1958, 72 Stat. 771, 49 U.S.C. 1401(a), petitioner registered the helicopter with the Federal Aviation Administration, for use in promoting highway safety. In performing that function, the helicopter serves as an airborne command post and provides transportation in medical emergencies. On occasion, petitioner's state police also use the helicopter to search for criminal suspects and escapees from correctional facilities (Complaint, A. 7–8).

Pursuant to 26 U.S.C. 4491, an annual excise tax is imposed upon the use of taxable civil aircraft in the navigable airspace of the United States.[1] The term

[1] The annual rate of tax is $25, plus 2 cents per pound of takeoff weight in excess of 2,500 pounds for nonturbine-powered aircraft, and 3½ cents per pound of takeoff weight for turbine-powered aircraft (see 26 U.S.C. 4491(a)).

"taxable civil aircraft" includes any engine-driven aircraft "registered, or required to be registered under section 501(a) of the Federal Aviation Act of 1958" (26 U.S.C. 4492(a)(1)). Section 154.3–1(b)(2) of the Temporary Regulations in connection with the Airport and Airway Revenue Act of 1970 (26 C.F.R.) defines "taxable civil aircraft" to include "civil aircraft owned by the United States and State and local governments"[2] (Appendix, *infra,* p. 30).

For its taxable year ended June 30, 1971, petitioner paid $131.43 (plus interest and penalties) in federal aircraft use taxes. Petitioner thereafter sought a refund of these taxes, which was denied (Pet. App. A–5; Ex. E, A. 18–19).

In this refund suit brought by petitioner in the United States District Court for the District of Massachusetts, the district court upheld the constitutionality of the tax as applied to aircraft owned by the states as a valid user charge. In the district court's view, the tax was a user charge because the proceeds of the tax are allocated to a special trust fund used exclusively for the expansion and improvement of airports and the airway system throughout the Nation (Pet. App. A–2).[3]

The court of appeals affirmed (Pet. App. A–5 to A–10). It stated: "We view * * * [the tax] as 'a

[2] Military aircraft are exempt from the tax. See Temporary Regulations, Section 154.3–1(b)(2); H.R. Rep. No. 91–601, 91st Cong., 1st Sess. 48–49 (1969).

[3] On the authority of *City of New York* v. *United States*, 394 F. Supp. 641 (S.D. N.Y.), affirmed, 538 F. 2d 308 (C.A. 2), certiorari denied, 429 U.S. 825, the district court also rejected petitioner's claim that the states are constitutionally immune from federal taxation (Pet. App. A–2).

charge for services rendered [which] represents a quid pro quo, and [which] as such, is outside the scope of the doctrine of implied intergovernmental tax immunity.' *Texas* v. *United States,* 72–2 U.S. Tax Cas. ¶ 16.04[8] (W.D. Tex. 1972), aff'd, 73–1 U.S. Tax Cas. ¶ 16,085 (5th Cir. 1973)" (Pet. App. A–7). The court concluded that "'[n]othing in the historical basis of dual sovereignty underlying the principle of state immunity from federal taxation requires that the states continue to receive the benefit of airway facilities and services actually used by the states but furnished by the Federal Government without bearing their equitable share of the costs incurred in providing those particular benefits. * * * No logical reason exists why all users of the air transportation system should not pay their fair share of such costs'" (Pe.. App. A–10, quoting from *State of Texas* v. *United States,* 72–2 U.S.T.C. ¶ 16,048, p. 86,131, decided July 11, 1972 (W.D. Tex.), affirmed *per curiam,* 73–1 U.S. T.C. ¶ 16,085, decided December 4, 1972 (C.A. 5)).

SUMMARY OF ARGUMENT

A.

The court of appeals correctly upheld the constitutionality of the federal civil aircraft use tax as applied to aircraft owned by the states and used for official purposes.

The statute in question—Section 4491 of the Internal Revenue Code—was enacted as part of the Airport and Airway Development and the Airport and Airway Revenue Acts of 1970. These Acts pro-

vide for substantial expansion and improvement of the airport and airway system to be financed in large measure "through the imposition and application of airport and airway user charges" (H.R. Rep. No. 91–601, 91st Cong., 1st Sess. 1 (1969)), including an annual excise tax imposed upon the use of taxable civil aircraft under Section 4491.

Contrary to petitioner's argument, the aircraft use tax is a user charge. Both the language of the statute and the pertinent legislative history show that the levy was "based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system" (H.R. Rep. No. 91–601, *supra,* at 40). Petitioner's contention that the tax is not a user charge because it is not directly correlated to the frequency of use was rejected almost 30 years ago in *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542.

B.

Since the aircraft use tax is a user charge, petitioner's further argument that it is constitutionally immune from federal taxation must likewise fail. There is a fundamental difference between a tax that is designed to produce revenue to support general governmental activities, and a user charge which is designed to recoup part of the cost of governmental facilities and services directly from those who benefit from them. In substantially analogous cases, this Court has held that charges for services rendered by state and local governments for pilotage or wharfage, even though graduated by tonnage, do not violate Article

I, Section 10, clause 3 of the Constitution, which provides that "[n]o State shall * * * lay any Duty of Tonnage." See, *e.g., Clyde Mallory Lines* v. *Alabama ex rel. State Dock Commission,* 296 U.S. 261; *Huse* v. *Glover,* 119 U.S. 543; *Packet Co.* v. *St. Louis,* 100 U.S. 423; *Packet Co.* v. *Keokuk,* 95 U.S. 80, 84. Cf. *The Minnesota Rate Cases,* 230 U.S. 352, 405. See also *Head Money Cases,* 112 U.S. 580, 595–596. Similarly, the Court has upheld state motor vehicle license and registration fees levied as compensation for the use of highway facilities furnished by the state. See, *e.g., Capitol Greyhound Lines* v. *Brice, supra*; *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners,* 332 U.S. 495; *Hendrick* v. *Maryland,* 235 U.S. 610.

Finally, the Court has sustained state and local enplaning charges upon commercial airline passengers as compensation for the use of state-provided airport facilities (*Evansville Airport* v. *Delta Airlines,* 405 U.S. 707), against the challenge that, because they were imposed upon vehicles or passengers in interstate commerce, they impermissibly interfered with that commerce. As the Court stated in *Hendrick* v. *Maryland, supra,* 235 U.S. at 623–624, "there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."

Accordingly, this case presents no occasion to consider the present status of the doctrine of implied constitutional immunity of the states from federal taxation. Here, the annual excise tax on the use of

civil aircraft is not a tax subject to any constitutional restrictions but is simply a required payment by the user for airport and airway facilities funded or provided by the federal government. Petitioner can no more claim the right to free use of these facilities than it could, for example, use the postal service without purchasing stamps.

Nor does the tax interfere with the exercise of any of the sovereign functions of the states. By imposing this user charge, Congress sought to require that all aircraft using the national airway system, including the aircraft of the states, pay their proportionate share of the cost of improving and maintaining essential airport and airway facilities.

ARGUMENT

THE FEDERAL EXCISE TAX UPON THE USE OF CIVIL AIRCRAFT IS CONSTITUTIONAL AS APPLIED TO AIRCRAFT OWNED BY THE STATES AND USED FOR OFFICIAL PURPOSES

A. THE FEDERAL CIVIL AIRCRAFT USE TAX IS A CHARGE FOR THE USE OF AIRPORTS AND AIRWAYS

1. This case presents a constitutional challenge by the Commonwealth of Massachusetts to a federal tax statute enacted as an integral part of a comprehensive program to improve the Nation's air transportation system.[4] The provision in question—Section 4491 of the Internal Revenue Code—was enacted as part of the Airport and Airway Development and Reve-

[4] The question is also presented in *State of Georgia* v. *United States,* 430 F. Supp. 823 (N.D. Ga.), pending on the government's appeal to this Court (No. 77-16).

nue Acts of 1970, 84 Stat. 219, 236, which Congress passed upon finding "[t]hat the Nation's airport and airway system * * * [was] inadequate to meet the current and projected growth in aviation" and "[t]hat substantial expansion and improvement of the airport and airway system * * * [was] required to meet the demands of interstate commerce, the postal service, and national defense."[5]

The statute, in two Titles, provided for substantial expansion and improvement of the airport and airway system, to be financed in large measure "through the imposition and application of airport and airway user charges" (H.R. Rep. No. 91–601, 91st Cong., 1st Sess. 1 (1969)), including an annual registration (*i.e.*, excise) tax imposed upon the use of taxable civil aircraft under Section 4491 of the Internal Revenue Code. See H.R. Rep. No. 91–601, *supra*, at 38; S. Rep. No. 91–706, 91st Cong., 2d Sess. 5 (1970).[6] Section

[5] See Section 2 of the Airport and Airway Development Act of 1970, 84 Stat. 219, 49 U.S.C. 1701.

[6] The Airport and Airway Revenue Act increased two existing user charges and added two user charges: (1) Section 202 of the Act amended Section 4041 of the Internal Revenue Code by increasing the gasoline tax on noncommercial general aviation; (2) Section 203 amended Section 4261 of the Code by increasing the air passenger ticket tax for domestic flights from five to eight percent and adding a $3 "head tax" on international flights originating in the United States; (3) Section 204 added Section 4271 to the Code, which imposed a five percent user tax on the transportation of property by air; and (4) Section 206 added Section 4491 to the 1954 Code (the tax at issue here), which provided for annual registration taxes in accordance with the weight and type of aircraft involved.

4492 of the Code defines the term "taxable civil aircraft" to include any engine-driven aircraft "registered, or required to be registered under section 501 (a) of the Federal Aviation Act of 1958." Under Section 154.3–1(b)(2) of the Temporary Regulations issued under the Airport and Airway Revenue Act of 1970 (1954 Code) (26 C.F.R.), "taxable civil aircraft" includes "civil aircraft owned by the United States and State and local governments" (Appendix, *infra*, p. 30). See H.R. Rep. No. 91–601, *supra*, at 48–49.

The language of the statute shows that Congress viewed the aircraft registration tax as a user charge. Section 4491(a) speaks of a tax "on the use of any taxable civil aircraft * * *." Section 4492(c)(2) defines the term "use" as "use in the navigable airspace in the United States." The taxable event under the statute is the use of the airports and airways by an aircraft. Section 154.3–1(b)(1) of the Temporary Regulations confirms this understanding by providing that "[m]ere possession of a civil aircraft does not constitute 'use.'"[7] Thus, the tax under Section 4491 is analogous to the variety of charges imposed by airports upon airplanes for landing rights, terminal use, and other privileges incident to the use of the airport and airway system.

The legislative history confirms that Congress intended the aircraft registration tax to be a user charge. In describing the purpose of the levies, the

[7] The descriptive title of the statute complements the operative language. It speaks of "An Act * * * for the imposition of airport and airway user charges * * *" (see 84 Stat. 219).

House Ways and Means Committee Report observed that "the civil users of the system should pay an increasing portion of the total Federal Government outlays for the air transportation system." H.R. Rep. No. 91–601, *supra,* at 35.[8] The report also stated that "[i]t appears appropriate to impose some direct *user charge* on air carriers themselves * * * since air carriers presently are not paying a direct user tax with respect to the use of the aviation system" (emphasis added.) The report further described "[t]he aircraft registration fee * * * [as] based upon the premise that all aircraft should pay a basic fee as an entry fee to use the system." *Id.* at 40. Thus, Congress withdrew the exemptions that federal, state, and local governments previously had from the companion tax on the transportation of persons by air (26 U.S.C. 4261). As the House Report concluded, "since this tax is now generally viewed as a user charge * * * there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities." *Id.* at 46. See also 114 Cong. Rec. 8987 (1968).[9]

[8] See also H.R. Rep. No. 91–601, *supra*, at 38; S. Rep. No. 91–706, *supra*, at 2, 5; Statement of John A. Volpe, Secretary of Transportation, Hearings on Administration's Proposal on Aviation User Charges before the House Committee on Ways and Means, 91st Cong., 1st Sess. 35–36 (1969).

[9] The House Committee further stated that "new and increased air user taxes" were necessary to provide additional funding for the expansion and development of an improved airport and airway system. H.R. Rep. No. 91–601, *supra*, at 38. See also S. Rep. No. 91–706, *supra*, at 5; H.R. Rep. No. 94–594, 94th Cong., 1st Sess. 11, 45 (1975).

As part of this comprehensive air transportation legislation, Congress established the Airport and Airway Trust Fund [10] to ensure that the user taxes were expended only for the improvement and maintenance of the air transportation system. This fund is the depository of the proceeds of the various airport and airway user charges from which the air transportation expenditures are made, including the tax here involved. It is the direct link between the Development Act and the excise tax at issue in this case. See H.R. Rep. No. 91–601, *supra*, at 41, 49–50.[11]

The user charges that are paid into the fund are expended for the development of airports, from the planning stages through construction, and for the planning, research, development, operation and main-

[10] See Section 208 of the Airport and Airway Revenue Act of 1970, 49 U.S.C. 1742.

[11] The legislative history specifically refutes petitioner's assertion (Br. 36–37 n. 42) that "there is * * * no direct link made between the use of that system and payment of the tax." See, *e.g.*, H.R. Rep. No. 91–601, *supra*, at 3: "Under this legislation a better future is promised because a trust fund will be established and there will be a direct relationship between the use of the system and the money generated to meet the needs required by the users. It is fitting that the primary financial burden will be assumed by the direct users."

Moreover, it does not matter that these airport and airway user charges will not pay for the entire cost of establishing and maintaining the improved air transportation system. The correctness of the user charge classification does not depend upon a perfect correlation between costs and revenues. It rests solely upon the premise that all persons who make use of the system must pay a fee for that use. See H.R. Rep. No. 91–601, *supra*, at 40; S. Rep. No. 91–706, *supra*, at 8.

248—472—77——3

tenance of air traffic control, air navigation, communications, and supporting services for the airway system (Secs. 208(f)(1)(A) and (B) of the Airport and Airway Revenue Act, 49 U.S.C. 1742(f)(1)(A) and (B)). These latter services, provided almost entirely by the Federal Aviation Administration, are available to all users of the airway system, both public and private alike. The 1970 Acts thus supplement the provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*, under which the Administrator of the Federal Aviation Administration regulates the use of navigable airspace, prescribes air traffic rules, and acquires facilities necessary to insure aircraft safety. See 49 U.S.C. 1348.

2. The foregoing legislative history of the Airport and Airway Development and Revenue Acts confirms the correctness of the court of appeals' conclusion that the federal aircraft use tax is " 'a charge for services rendered [which] represents a quid pro quo' " (Pet. App. A–7, quoting from *State of Texas* v. *United States, supra,* 72–2 U.S.T.C. at 86,131). The charges are based upon the congressional judgment that the cost of maintaining and developing the air transportation system should be borne to some extent by the direct users of that system, in much the same way that the cost of toll roads is borne by those who use such roads (see H.R. Rep. No. 91–601, *supra,* at 38, 48).

Contrary to petitioner's argument (Br. 28–41), the aircraft use tax is a user charge despite the fact that it is not computed on the exact amount of use by each

aircraft.[12] In *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542, the Court rejected exactly the same contention. There, the Court sustained a Maryland highway toll of "2% upon the fair market value of motor vehicles used in interstate commerce" (*id.* at 543, 546).[13] Like petitioner, the carrier argued that the correlation between the tax and use was not precise enough to uphold the toll as a valid user charge. But the Court concluded that the "tax * * * should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted" (*id.* at 545). Cf. 339 U.S. at 548 (Frankfurter, J., dissenting).[14] The Court's further

[12] Petitioner also argues (Br. 38–40) that the Airport and Airway Cost Allocation Study of the United States Department of Transportation (1973) supports its position that the charges imposed by Section 4491 are not true user fees. However, the Study is precisely to the contrary (pp. 10–11, 43, 50, 56). It reflects the user fee character of the present system, and points out (p. 43) that even after the 1970 Act, approximately one-half of the federal costs are paid from general tax revenues. Indeed, the Study recommends (pp. 51–62) that users be required to pay a greater share of the costs of the system and that payments increase in accordance with greater use.

[13] The Court had earlier held that a state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, as long as the fee was not excessive. See, *e.g.*, *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285; *Morf* v. *Bingaman*, 298 U.S. 407; *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495. See also p. 18 n. 17, *infra.*

[14] The Maryland tax in *Capitol Greyhound Lines* also imposed a mileage charge upon the interstate carriers in addition to the two percent tax, so as to require heavy road users to bear more of the costs of maintaining roads. Here, too, Section 202 of the Air-

statement (*id.* at 546–547) forecloses petitioner's contention that the tax at issue is not a user charge:

> Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with "rough approximation rather than precision." *Harvester Co.* v. *Evatt,* 329 U.S. 416, 422–423. Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. *Aero Transit Co.* v. *Georgia Comm'n,* 295 U.S. 285, 289. Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads. [Footnote omitted.]

B. THE DECISIONS OF THIS COURT ESTABLISH THAT A USER CHARGE FOR FACILITIES PROVIDED OR SERVICES RENDERED IS NOT SUBJECT TO THE CONSTITUTIONAL RESTRICTIONS APPLICABLE TO TAXES

1. Petitioner claims that even if the tax at issue is a true user charge, it is barred by the implied constitutional immunity of the states from federal taxation.

port and Airway Revenue Act of 1970 also increased the fuel tax on noncommercial general aviation in order to tax heavy users more. See S. Rep. No. 91–706, *supra*, at 7–8; H.R. Rep. No. 91–601, *supra*, at 39–40.

But this Court has long held that there is a fundamental difference between a tax that is enacted to support general governmental activities, and a user charge that is designed to recoup part of the cost of providing particular governmental facilities and services directly from those who benefit from them.[15]

In substantially analogous cases, the Court has upheld the constitutionality of taxes constituting fees for services rendered by the United States and by state and local governments. In the *Head Money Cases,* 112 U.S. 580, the owners of ships transporting immigrant passengers to the United States were subjected to a federal tax of 50 cents per passenger. In up-

[15] Petitioner further argues (Br. 35–37) that the validity of all user charges imposed by the federal government should be tested under the standards of *National Cable Television Assn.* v. *United States*, 415 U.S. 336, and *Federal Power Commission* v. *New England Power Co.*, 415 U.S 345. The Court there characterized a user charge as a fee for a "measurable unit or amount of Government service or property from which * * * [a recipient] derives a special benefit" (415 U.S. at 349).

But the Court did not hold that user fees could be imposed by Congress only at a level commensurate with the measurable use by the recipient. To the contrary, the Court concluded that under the congressional delegations of authority to the licensing agencies involved, the license fees must be geared to the costs directly incurred by the agency in establishing and administering the licensing procedures. Indeed, petitioner acknowledges (Br. 37) that in *National Cable* and *New England Power Co.*, the limitation was on the "federal agencies' authority to impose charges" and was deemed necessary "to prevent dilution of the basic constitutional precept that the legislative branch alone may levy taxes" (see also Pet. Br. 35 n. 39). Here, on the other hand, the user charge is imposed by an Act of Congress and not an administrative agency.

holding the tax against the claim that it was not levied to provide for the common defense and general welfare and was not uniform as required by Article I, Section 8 of the Constitution, the Court observed that the levy was not "strictly speaking, a tax or duty within the meaning of the Constitution" (112 U.S. at 595–596), but rather was a means of regulating foreign commerce. The Court noted that the funds raised "[did] not go to the general support of the government" (*id.* at 596), but constituted a special "immigrant fund," the proceeds of which were used to "defray the expense of regulating immigration * * * [and to provide] for the care of immigrants arriving in the United States" (*id.* at 590; Act of August 3, 1882, Section 1, 22 Stat. 214).

Similarly, in *Packet Co.* v. *Keokuk,* 95 U.S. 80, the Court held that charges for services rendered by state and local governments for pilotage or wharfage, even though graduated by tonnage, were not taxes in the traditional sense and therefore did not violate Article I, Section 10, clause 3 of the Constitution, which provides that "[n]o State shall * * * lay any Duty of Tonnage." As the Court stated, "a charge for services rendered or for conveniences provided is in no sense a tax or a duty" (*id.* at 84). See also *Packet Co.* v. *St. Louis,* 100 U.S. 423; *Huse* v. *Glover,* 119 U.S. 543; *Clyde Mallory Lines* v. *Alabama ex rel. State Dock Commission,* 296 U.S. 261. Cf. *The Minnesota Rate Cases,* 230 U.S. 352, 405. While petitioner (Br. 25) seeks to dismiss these decisions as historical anachronisms, they stand for a proposition of continuing

validity, *viz,* that particularized charges for the use of services rendered can be imposed despite constitutional limitations on the sovereign's taxing power.

More recently, in *Capitol Greyhound Lines* v. *Brice, supra,* 339 U.S. 542, the Court upheld a Maryland tax on all common carriers transporting passengers over Maryland roads, against a claim by interstate carriers that the tax violated the Commerce Clause. The tax was two percent of the fair market value of the vehicles and payment was a prerequisite to their operation within the state. The Court pointed out that the "tax applies to interstate and intrastate commerce without discrimination," that the "tax proceeds are used by Maryland wholly for road purposes," and that "the tax was imposed for the privilege of road use" (*id.* at 544).

Similarly, in *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners,* 332 U.S. 495, the Court sustained two Montana taxes of $10 and $15 per vehicle against a claim by an interstate carrier that they violated the Commerce Clause. The Court characterized the taxes as valid user charges (*id.* at 503) that were "exacted 'in consideration of the use of the highways of this state,' that is, they are laid for the privilege of using those highways."[16] The Court

[16] Contrary to petitioner's argument (Br. 30–31), it does not matter that the federal government is not the "proprietor" of the airports or airways. None of the Court's decisions sustaining the constitutionality of user charges has rested on that narrow ground. The critical element in the Court's analysis is that when services are rendered, in whatever capacity, the supplier of those services is entitled to charge a fee, which may take the form of a tax. See, *e.g., Head Money Cases, supra; Packet Co.* v. *Keokuk, supra.*

upheld the Montana user charges, even though they were not allocated to a special trust fund, as is the aircraft use tax, but were commingled with other revenues in the general state treasury.[17]

Finally, in *Evansville Airport* v. *Delta Airlines*, 405 U.S. 707, the Court upheld the constitutionality of closely-analogous state air transportation user charges. There, the state imposed a "use and service charge" of one dollar "for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" in Evansville, Indiana (*id.* at 709). Like the aircraft use tax in this case, the state-tax in *Evansville Airport* was imposed upon the users of the airport and supporting services, and the funds collected were separately maintained for the purpose of improving the air transportation system.

[17] The Court has consistently upheld state charges for road use against claims that they violated the Commerce Clause. See, *e.g.*, *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542; *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285; *Hicklin* v. *Coney*, 290 U.S. 169; *Continental Baking Co.* v. *Woodring*, 286 U.S. 352; *Interstate Busses Corp.* v. *Blodgett*, 276 U.S. 245; *Clark* v. *Poor*, 274 U.S. 554; *Kane* v. *New Jersey*, 242 U.S. 160; *Hendrick* v. *Maryland*, 235 U.S. 610. In the latter case, the Court stated that "there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor" (235 U.S. at 623–624). But cf. *McCarroll* v. *Dixie Lines*, 309 U.S. 176, where a state gasoline tax imposed on fuel in excess of 20 gallons brought into the state by a vehicle for use by that vehicle was struck down where it was shown to bear no reasonable relationship to road use. There, the taxpayer demonstrated that the gasoline in excess of 20 gallons that was subject to tax was substantially more than it consumed within the state. See 309 U.S. at 180–183, Stone, J., concurring.

In rejecting the airlines' contention that the tax was an unreasonable burden on interstate commerce, the Court reaffirmed that it was "settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike" (405 U.S. at 714). The Court concluded that a user charge is constitutional if it is (1) nondiscriminatory; (2) based upon some fair approximation of use or the privilege for use; and (3) not shown to be excessive in comparison with the governmental benefits conferred (*id.* at 716–720).

2. Under the standards in *Evansville Airport* for appraising the constitutionality of user charges, the federal aircraft use tax in this case is valid. First, the tax is nondiscriminatory and petitioner does not contend otherwise. Second, the tax, computed as a flat fee for the privilege of using the air transportation system, is tied to use and is therefore based upon a fair approximation of use or privilege for use.

Finally, the tax is not excessive in comparison with the governmental benefits conferred, which include the funding of airport development and the operation of air traffic control, air navigation, and communications for the national airway system.[18] See Section 208(f)

[18] The authority to use trust fund monies for the "maintenance and operation" of air navigation facilities was temporarily repealed in 1971 on account of administration abuses (see Pub. L. 92–174, 85 Stat. 491–492). However, in 1976, Congress substantially restored that authority (see Section 6 of the Airport and

(1)(A) and (B) of the Airport and Airway Revenue Act of 1970, 49 U.S.C. 1742(f)(1) (A) and (B). The annual base user charge is $25 per aircraft, which is hardly excessive in comparison with the extensive benefits provided. As the Court observed in *Evansville Airport,* "a state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive" (405 U.S. at 715). Accord: *Capitol Greyhound Lines* v. *Brice, supra,* 339 U.S. at 547. For the taxable year at issue with respect to which petitioner seeks to recover $131.43 in tax in this refund suit, petitioner received more than $1.5 million from the Airport and Airway Trust Fund in planning and development grants. See *Second Annual Report of Operations under the Airport and Airway Development Act,* Department of Transportation, pp. 9, 12–13, 18, 29–30 (1971).

In view of the explicit legislative history characterizing the aircraft use tax as a user charge and the decisions of this Court upholding analogous user

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Airway Development Act Amendments of 1976, Pub. L. 94–353, 90 Stat. 872). See generally H.R. Rep. No. 94–594, 94th Cong., 1st Sess. 45–46 (1975). Under the 1976 amendments, trust fund monies may be appropriated, within certain dollar limits, for costs assessed against the United States under international agreements relating to the joint financing of air navigation services, and for costs incurred by the Federal Aviation Administration (see 49 U.S.C. 1655(c)) to maintain air navigation facilities (as described in 49 U.S.C. 1348(b)) in a safe and efficient condition. See Airport and Airway Development Act Amendments of 1976, Pub. L. 94–353, Section 6(d), (e), 90 Stat. 873–874.

charges against claims similar to that of petitioner, it is not surprising that the lower courts have uniformly sustained the constitutionality of the companion taxes on the transportation of persons and property by air (26 U.S.C. 4261, 4271) as applied to state and local employees. In *State of Texas* v. *United States, supra,* upon which the decision below relied (Pet. App. A–7, A–10), the court held that the air passenger ticket tax could be constitutionally imposed upon state employees traveling on official business. In the court's view, the charge was "not a tax in the traditional sense, but instead is a charge for services rendered and represents a quid pro quo, and as such, is outside the scope of the doctrine of implied intergovernmental tax immunity" (72–2 U.S.T.C. at 86,131; citations omitted). As the court further stated, in terms particularly appropriate to this case (*ibid.*)—

> Nothing in the historical basis of dual sovereignty underlying the principle of state immunity from federal taxation requires that the states continue to receive the benefit of airway facilities and services actually used by the states but furnished by the Federal Government without bearing their equitable share of the costs incurred in providing those particular benefits. Even employees of the Federal Government must pay the air transportation charge. No logical reason exists why all users of the air transportation system should not pay their fair share of such costs.

Accord: *City of New York* v. *United States,* 394 F. Supp. 641 (S.D. N.Y.), affirmed, 538 F. 2d 308 (C.A.

2), certiorari denied, 429 U.S. 825; *State of California* v. *United States*, 77–2 U.S.T.C. ¶ 16,266, decided May 31, 1977 (E.D. Cal.).

3. Since the aircraft excise tax is a user charge, its application to petitioner's aircraft does not violate any implicit constitutional immunity the states and localities may have from federal taxation. Under the decisions of this Court discussed above, such user charges are not taxes subject to the constitutional limitations on the taxing powers of the federal and state governments. Thus, this case presents no occasion to consider the present status of the implied constitutional immunity of the states from federal taxation.[19]

[19] However, petitioner's assertion (Br. 41) that state tax immunity "remains alive and well" is questionable. The Court originally recognized such an immunity in *The Collector* v. *Day*, 11 Wall. 113, except where the states engage in business of a private non-governmental character (see, *e.g.*, *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292 U.S. 360). But in *Helvering* v. *Gerhardt*, 304 U.S. 405, the Court sustained a federal income tax on salaries of employees of the bi-state Port of New York Authority. *Gerhardt* turned in part upon the fact that the tax on the employees was not deemed to be a tax on the governmental entity. Cf. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466. However, in *Gerhardt* the Court also reaffirmed the distinction drawn by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, between the position of the national government (acting with powers of supremacy under the Constitution) and the states, which are not accorded such preeminent powers. Although petitioner refers (Br. 15) to *McCulloch* as the origin of the principle that the states are immune from federal taxation, Chief Justice Marshall explicitly stated that the Article VI immunity of the federal government from state taxation was not reciprocal (see 4 Wheat. at 435–436).

Similarly, in *New York* v. *United States*, 326 U.S. 572, the Court upheld a federal tax upon the sale of mineral water by the State of New York. The case could have turned upon the distinction drawn in the earlier cases between governmental and private activities. However, none of the opinions of the members of the Court voting to sustain the tax rested upon that narrow ground. While the case was decided without the adherence of a majority to any of the opinions supporting the judgment, under the various tests suggested in the plurality opinions, the aircraft use tax at issue here would be valid.

Those tests are: (1) whether the tax is nondiscriminatory (326 U.S. at 582–584, Frankfurter, J.); (2) whether Congress expressly stated its intention that the tax apply to governmental organizations (*id.* at 584–586, Rutledge, J.); and (3) whether the tax unduly interferes with the performance of the sovereign functions of government, in the sense of actual impairment of state or city functions (*id.* at 586–590, Stone C.J.). See also *National League of Cities* v. *Usery*, 426 U.S. 833, 843–844 and nn. 13, 14; *id.* at 863–864 (Brennan, J., dissenting); McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. Rev. 485, 493 (1973). The aircraft use tax is nondiscriminatory under the first test and, as shown at pp. 23–26, *infra*, does not interfere with the sovereign functions of the states under the third test. Moreover, the withdrawal of the exemptions from the passenger tax for state and local employees, and the statement in the legislative history that the states and localities should pay their fair share of the use of airway facilities, shows that Congress intended such taxes to apply to the states (see p. 10, *supra*).

It is therefore not surprising that shortly after the decision in *New York* v. *United States*, *supra*, one commentator concluded that "since the beginning of 1938, it is apparent that the Court has rejected the reciprocal rule of tax immunity, returned to the basis of earlier decisions and reaffirmed Chief Justice Marshall's understanding that the immunity doctrine protected the Federal Government against taxation by the states but did not equally shield the states against the exercise of the delegated and supreme taxing power of the Federal Government." Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 Fed. Bar J. 3, 27 (1950).

4. Finally, the aircraft use tax as applied to petitioner's helicopter does not improperly impinge upon the exercise of its sovereign functions. If the federal

government subsidizes property or a facility, it may make that property or facility available on the condition that the user comply with reasonable conditions. When such property or facilities are made available to the states or their political subdivisions, the federal government may likewise impose such conditions without invading or diminishing the sovereignty of the states or local governments.

For example, the Court has upheld congressional restrictions on a city's use of electric power derived from facilities constructed on federal lands (*United States* v. *San Francisco,* 310 U.S. 16), on the use of federal funds for irrigation and reclamation projects (*Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 294–296), and on the activities of state officials administering federal funds supplied for highway construction (*Oklahoma* v. *Civil Service Commission,* 330 U.S. 127). Petitioner has no more right to free use of the federally-provided airport and airway facilities than it could, for example, use the postal service without stamping its mail.

While petitioner argues (Br. 54) that the tax is imposed upon "the performance of * * * [its] sovereign function of protecting the public safety," petitioner's sovereign functions are not the subject of any federal tax or charge. When petitioner undertakes to perform its sovereign functions by using a helicopter in the navigable airspace of the United States, it incurs the charges that Congress has imposed upon the use and enjoyment of navigational

facilities subsidized by the federal government and upon the use of navigable airspace controlled in extensive detail by the federal government. Since petitioner does not deny that it uses facilities furnished by the federal government, the reasonable charge imposed by the United States is not barred by the tax immunity doctrine.

Since the aircraft excise tax is a user charge, petitioner's reliance (Br. 52–53) upon *National League of Cities* v. *Usery,* 426 U.S. 833, is misplaced.[20] There, the Court held that the 1974 amendments to the Fair Labor Standards Act that extended the Act's minimum wage and maximum hour provisions to almost all employees of the states and their political subdivisions were unconstitutional.

The Court concluded that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by * * * [the Commerce Clause]" (426 U.S. at 852).

The nondiscriminatory charge for the use of federally-improved airport facilities is not comparable to the imposition of federal-wage-and-hour standards with respect to state and local government employ-

[20] In holding the user tax unconstitutional as applied to the states, the district court in *State of Georgia* v. *United States, supra,* relied upon *National League of Cities.* See J.S. App. A 1a–7a of our Jurisdictional Statement in that case (No. 77–16). We are serving a copy of this brief upon counsel for the appellee in *State of Georgia.*

ment. By imposing this user charge, Congress has not displaced the states' freedom to structure and conduct their governmental functions. It simply requires that all aircraft using the national airway system, including the aircraft of the states, pay their proportionate share of the cost of improving and maintaining the essential airport and airway facilities. Nothing in *National League of Cities* insulates the states from having to pay reasonable charges for services and facilities provided to them by the federal government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 4491 [as added by Sec. 206(a), Airport and Airway Revenue Act of 1970, 84 Stat. 236, 243]. IMPOSITION OF TAX.

(a) *Imposition of tax.*—A tax is hereby imposed on the use of any taxable civil aircraft during any year at the rate of—

(1) $25, plus

(2)(A) [as amended by Sec. 305(a) of the Excise, Estate, and Gift Tax Adjustment Act of 1970, 84 Stat. 1836, 1846] in the case of an aircraft (other than a turbine-engine-powered aircraft) 2 cents a pound for each pound of the maximum certificated takeoff weight in excess of 2,500 pounds, or (B) in the case of any turbine engine powered aircraft, 3½ cents a pound for each pound of the maximum certificated takeoff weight.

(b) *By whom paid.*—Except as provided in section 4493(a), the tax imposed by this section shall be paid—

(1) in the case of a taxable civil aircraft described in section 4492(a)(1), by the person in whose name the aircraft is, or is required to be, registered, or

(2) in the case of a taxable civil aircraft described in section 4492(a)(2), by the United States person by or for whom the aircraft is owned.

(c) *Proration of tax.*—If in any year the first use of the taxable civil aircraft is after the first month in such year, that portion of the tax which is determined under subsection (a) (2) shall be reckoned proportionately from the first day of the month in which such use occurs to and including the last day in such year.

(d) *One tax liability per year.*—

(1) *In general.*—To the extent that the tax imposed by this section is paid with respect to any taxable civil aircraft for any year, no further tax shall be imposed by this section for such year with respect to such aircraft.

(2) *Cross reference.*—

For privilege of paying tax imposed by this section in installments, see section 6156.

(e) *Termination.*—On and after July 1, 1980, the tax imposed by subsection (a) shall not apply.

SEC. 4492 [as added by Sec. 206(a), Airport and Airway Revenue Act of 1970, *supra*]. DEFINITIONS.

(a) *Taxable civil aircraft.*—For purposes of this subchapter, the term "taxable civil aircraft" means any engine driven aircraft—

(1) registered, or required to be registered, under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401(a)), or

(2) which is not described in paragraph (1) but which is owned by or for a United States person.

(b) *Weight.*—For purposes of this subchapter, the term "maximum certificated takeoff weight"

means the maximum such weight contained in the type certificate or airworthiness certificate.

(c) *Other definitions.*—For purposes of this subchapter—

(1) *Year.*—The term "year" means the one-year period beginning on July 1.

(2) *Use.*—The term "use" means use in the navigable airspace of the United States.

(3) *Navigable airspace of the United States.*—The term "navigable airspace of the United States" has the definition given to such term by section 101(24) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1301 24)), except that such term does not include the navigable airspace of the Commonwealth of Puerto Rico or of any possession of the United States.

Temporary Regulations in connection with the Airport and Airway Revenue Act of 1970 (1954 Code) (26 C.F.R.):

§ 154.3–1 *Tax on use of civil aircraft.*

(a) *Purpose of this section.* In general, section 4491 of the Internal Revenue Code of 1954, as added by the Airport and Airway Revenue Act of 1970, imposes a tax upon the use, at any time during the taxable period, of any taxable civil aircraft in the navigable airspace of the United States. This tax is imposed upon such use during any taxable period beginning on July 1, 1970, and on each subsequent July 1 before July 1, 1980. This section sets forth rules as to the general applicability of the tax and also sets forth rules, as authorized by section 4493(a), to provide a method whereby certain lessees of tax-

able civil aircraft may elect to be liable for the tax. Further, this section provides administrative provisions relating to the payment of tax and the filing of tax returns.

(b) *Definitions.*—(1) *Use.* The term "use" means use in the navigable airspace of the United States, as defined in section 4492(c)(3), except that such term does not include use by a manufacturer, dealer, wholesaler, retailer, exporter, or importer of aircraft solely for demonstration, testing, or delivery purposes. Mere possession of a civil aircraft does not constitute "use."

(2) *Taxable civil aircraft.*—The term "taxable civil aircraft" means any engine powered aircraft which is either registered or required to be registered under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1401(a)) or which is owned by or for a U.S. person. Such term includes civil aircraft owned by the United States and State and local governments. Military aircraft and aircraft of the National Guard are not within the definition of taxable civil aircraft.

* * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-1500

THE COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF OF CITY OF NEW YORK AMICUS CURIAE

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TABLE OF CONTENTS

Page

Table of Cases..... iii

Statutes Cited..... iv

Authorities Cited..... v

Statement..... 1

Interest of the Amicus Curiae..... 1

Opinion Below..... 3

Summary of Argument..... 3

Point I

IF THE TAX IS ASSUMED TO BE A USER CHARGE, ITS IMPOSITION ON THE COMMONWEALTH OF MASSACHUSETTS FOR ITS USE OF A HELICOPTER FOR PUBLIC SAFETY PURPOSES IS AN IMPERMISSIBLE LEVY AND AN INFRINGEMENT ON THE SOVEREIGNTY OF THE COMMONWEALTH..... 4

Point II

THE TAX WAS CALLED A TAX IN THE LAW WHICH ADDED IT TO THE INTERNAL REVENUE CODE, P.L. 91-258, 26 U.S.C. §4491. IT MAY NOT BE IMPOSED ON THE FUNCTIONS OF A STATE GOVERNMENTAL IN NATURE, INDEED UNIQUELY GOVERNMENTAL..... 6

Point III

THE TAX IN QUESTION DID NOT BECOME A USER CHARGE SIMPLY BECAUSE ITS PROCEEDS HAVE BEEN EARMARKED FOR AIRWAY IMPROVEMENT..... 13

Conclusion..... 19

TABLE OF CASES

	Page
Alabama v. King & Boozer, 314 U.S. 1 (1941).....	8
Allen v. Regents, 304 U.S. 439 (1938).....	7,9
City of New York v. United States, 394 F. Supp. 641 (D.C. So. D. N.Y. 1975) aff'd. 538 F. 2d 308,(2 Cir. 1976), Cert. den. _____U.S._____(1976).....	2,5
Collector v. Day, 78 U.S. (11 Wall.) 113 (1870)..	6
Curry v. United States, 314 U.S. 14 (1941).....	8
First Nat. City Bank v. City of N.Y. Finance Administration, 44 A.D. 2d 774, 354 N.Y. Supp. 2d 901, lv. to app. den., 34 NY 2d 519 (1974).....	16
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939)...	7,8
Helvering v. Gerhardt, 304 U.S. 405 (1938).....	6,8
James v. Dravo Contracting Co., 302 U.S. 134 (1937).....	8
Massachusetts v. United States, 548 F. 2d 33 (1977).....	3
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)..	6
National League of Cities v. Usery, 426 U.S. 833 (1976).....	13
New York v. United States, 326 U.S. 572 (1946).....	7
Ohio v. Helvering, 292 U.S. 360 (1934).....	7
South Carolina v. United States, 199 U.S. 437 (1905).....	7
Texas v. United States, 72-2 U.S. Tax Cas., ¶16,048 (W.D. Tex., 1972), aff'd. 73-1 U.S. Tax Cas., ¶16,085 (5 Cir., 1972).....	5,9,14

STATUTES CITED

Admin. Code of the City of New York, §Z46-2.0.....	15
Airport and Airway Development and Airport and Airway Revenue Acts of 1970.....	10
Internal Revenue Code, §4261....	2,10,14
Internal Revenue Code, §4292....	10,14
Internal Revenue Code, §4491....	1,6
P.L. 84-627, June 29, 1956 c.462 Title II, 70 Stat. 397; 23 U.S. C. §120 f.n.....	17

P.L. 91-258, §208, 204 Stat. 250; 49 U.S.C. §1743..... 6,9

P.L. 91-605, Title I, §111(a), Dec. 31, 1970, 84 Stat. 1719; 23 U.S.C. §142..... 18

P.L. 93-87, Title I, §121(a), Aug. 13, 1974, 87 Stat. 259; 23 U.S.C. §142..... 18

AUTHORITIES CITED

Powell - The Waning of Inter-Governmental Tax Immunities, 58 Harv. L. Rev. 633 (1945)..... 8

Powell - The Remnant of Inter-Governmental Tax Immunities, id. 757..... 8

U.S.C. Cong. Ad. News, 91st Cong. 2d Sess., Vol. 2, 3091 (1970).. 10

U.S.C. Cong. Ad. News, 91st Cong. 2d Sess., Vol. 2, 3076-3125.... 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

THE COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

-against-

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF OF CITY OF NEW YORK AMICUS CURIAE

STATEMENT

The City of New York submits this brief for the reasons which immediately follow.

INTEREST OF THE AMICUS CURIAE

The case involves the constitutionality of the federal excise tax on the use of civil aircraft (26 U.S.C. §4491) when levied on a State. It has been held by the court below

to have been properly levied. The tax was applied to the petitioner's use of a helicopter for police purposes. The City of New York uses seven helicopters in its police department and has, in the past, paid an annual tax on them. Claims for refund of such payments have been denied. In addition, the City has been rebuffed in its attempts to recover on constitutional grounds taxes on Transportation by Air paid on governmental air transportation imposed pursuant to Internal Revenue Code §4261, subd. (a). City of New York v. United States, 394 F. Supp. 641 (D.C.S.D. N.Y. 1975), aff'd. 538 F. 2d 308 (2d Cir., 1976), cert. den. ___U.S.____(1976).*

* Since the issues are substantially the same in that case and this, we plan, in the event of reversal here, to seek leave to file a petition for rehearing of our petition for certiorari. In the event of affirmance, of course, there will be no such application.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, reported at 548 F. 2d 33 (1977), in affirming the judgment of the United States District Court for the District of Massachusetts, which had upheld the tax both on the basis of its being a "user's fee" and as a tax undeserving of sovereign immunity, placed its entire reliance on the notion that the tax was a user charge and that consequently it could be levied against the States.

SUMMARY OF ARGUMENT

If the tax on the use of aircraft be viewed as a user charge, its application to a State or its political subdivisions for their use of aircraft (helicopters) in police work is an unconstitutional infringement of the sovereignty of the States and may not be sustained.

There is no reason in the law to justify the characterization of the tax on aircraft

use as a user charge. The fact that the proceeds of this tax are earmarked for the improvement of airways does not result in the tax becoming that which it is not and is not called.

As a tax, the imposition in question is without constitutional warrant because, as applied in this case, it infringes on the sovereignty of the Commonwealth of Massachusetts.

POINT I

IF THE TAX IS ASSUMED TO BE A USER CHARGE, ITS IMPOSITION ON THE COMMONWEALTH OF MASSACHUSETTS FOR ITS USE OF A HELICOPTER FOR PUBLIC SAFETY PURPOSES IS AN IMPERMISSIBLE LEVY AND AN INFRINGEMENT ON THE SOVEREIGNTY OF THE COMMONWEALTH.

The Court below ruled that the tax was a user charge and that hence it was not necessary to reach the constitutional question of sovereign immunity. A similar method of disposing of a related tax on air transportation was used by the Court of Appeals for

the 5th Circuit in Texas v. United States, 72-2 U.S. Tax Cas., ¶16,048 (W.D. Tex., 1972) aff'd 73-1 U.S. Tax Cas., ¶16,085 (5th Cir., 1972). We believe that both these decisions are erroneous. The tax involved is called a tax and there is nothing in the law to indicate that it is a charge for services rendered.

Above and beyond this, we believe that even if it is a charge, such a levy imposes a charge on a State when it is exercising its sovereign powers and that, whether a charge or a tax, it may not infringe on that sovereignty. The characterization of this tax as a user charge in this case, the Texas case and City of New York v. United States, 394 F. Supp. 641, aff'd 538 F 2d 308 (2d Cir., 1976), has far reaching implications because, if the "user charge" imposed against the will of a State can be upheld, a similar charge conceivably may be levied against the Federal

government for services which are now provided without charge.

POINT II

THE TAX WAS CALLED A TAX IN THE LAW WHICH ADDED IT TO THE INTERNAL REVENUE CODE, P.L. 91-258, 26 U.S.C. §4491. IT MAY NOT BE IMPOSED ON THE FUNCTIONS OF A STATE, GOVERNMENTAL IN NATURE, INDEED, UNIQUELY GOVERNMENTAL.

Clearly the Commonwealth of Massachusetts enjoys, in its exercise of governmental functions, the immunity first proclaimed in Collector v. Day, 78 U.S. (11 Wall.) 113 (1870). While Collector v. Day involved the salary of a state judge, the immunity principle of that case continues to apply despite the fact that, in a later era, this Court held that salaries of State employees were subject to federal income tax. Helvering v. Gerhardt, 304 U.S. 405 (1938). Nor was the principle of McCulloch v. Maryland, 17 U.S. (4Wheat.) 316 (1819), affected by this Court's holding that federal

employees' salaries were subject to State income taxes. Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939).

Those cases simply held that the impact on a government resulting from an income tax on the salaries of its employees is too slight to require the application of the immunities accorded to governments. Nor do the cases which whittle down the States' immunity when the Federal tax impinges on non-governmental but proprietary activities [South Carolina v. United States, 199 U.S. 437 (1905); Ohio v. Helvering, 292 U.S. 360 (1934)(taxes on state liquor stores); Allen v. Regents, 304 U.S. 439 (1938) (Admissions tax on state university football games); New York v. United States,326 U.S. 572 (1946) (tax on mineral water)] have any bearing on the case at bar. Here we are dealing not with proprietary activities but with fundamental governmental acts - the maintenance of aircraft for police purposes.

See Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633 (1945): Powell, The Remnant of Intergovernmental Tax Immunities, Id., p.757. These articles bear titles which provide fuel for the opponents of State governmental immunity. The articles themselves paint a picture far less broad and extensive than the titles imply. For the most part, Professor Powell's articles discuss the pre-1945 inroads on the doctrine. Those inroads consist of the taxation of salaries of governmental employees [Helvering v. Gerhardt, 304 U.S. 405 (1938); Graves v. N.Y. ex rel. O'Keefe, 306 U.S. 466 (1939)]; other taxes which had only an indirect bearing on the government involved and which were levied on the taxpayer with the economic, but not the tax, burden falling on the government [Alabama v. King & Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937); Curry v. United States, 314 U.S. 14

(1941)]; cases involving proprietary activities [Allen v. Regents, 304 U.S. 439(1938); and other analagous holdings.

There is no warrant in the law for considering the tax in question a user charge. The claim that it is such is based on an untenable foundation. In the Texas case, 72-2 U.S. Tax Cas., ¶16,048 (W.D. Tex., 1972) aff'd. 73-1 U.S. Tax Cas., ¶16,085, (5th Cir., 1972), counsel for the State accepted the characterization and agreed in his Statement of Facts, that the "excise tax *** represented a user charge ***."

The question raised is whether the creation by the 1970 legislation of the Airway and Airport Trust Fund (P.L. 91-258, §208, 84 Stat. 250, 49 U.S.C. §1743), which provided that a sum equal to the amount of aircraft use and taxes on Transportation by Air collected should be appropriated for that Fund, converted those taxes into charges.

The Federal government argued successfully in the Texas case that what had been a tax for many years, the tax on Transportation by Air had been transformed into a user charge simply because the 1970 legislation amended I.R.C. §4261 to increase the rate of the tax. That tax had been increased by the Airport and Airway Development and by the Airport and Airway Revenue Acts of 1970. The amendment, however, merely raised the rate of tax and removed from the law the exemption given to state and local governments. I.R.C. §4292.

In the report of the House Committee which recommended the repeal of the provision exempting states and their subdivisions from the air transport tax, we find the genesis of the thought that the tax was a charge. That statement said [U.S.C. Cong. Ad. News, 91st Cong. 2d Sess., Vol 2, 3091 (1970)]: "***this tax [air transport] is

now generally viewed as a user charge." The lack of foundation for this statement is matched only by its inaccuracy. It was inaccurate because it was made before the 1970 legislation was enacted, before the trust fund was set up and before the Internal Revenue Code was amended. Yet it said that the tax, which had always been a tax, was, at the time of the report, viewed as a charge. Such a notion was not supported by the tax law itself prior to the amendment or by the amendatory enactment. In the laws imposing both the air transport and the aircraft use taxes, they are denominated taxes. They are part of the Internal Revenue Code and are subject to all of that Code's applicable provisions, most of which call the imposts taxes. To treat them as charges when the statutes imposing them contain no language indicating that they were intended to be anything other than taxes

would run contrary to the rules of statutory construction.

While it may be proper to advert to Committee reports to resolve an ambiguity, there is no ambiguity in the statute under consideration. The report of the Committee, which calls the Air Transportation tax a user charge, on numerous separate occasions, speaks of it as a tax (U.S.C., Cong. Ad. News, 91st Cong., 2d Sess., Vol. 2, 3076-3125). If the Congress had intended to impose a user charge in lieu of a tax, it could readily have done so by appropriate language in the statute which it was considering and passing, not in the Committee Report.

We feel the issue is plain and that there is no question about the nature of the activities taxed and their constitutional immunity. Counsel for the government have espoused the idea that there no longer remains in the States any vestige of immunity. In its

memorandum in opposition to the City of New York's application to this Court for a writ of certiorari (No. 75-1684) the following astonishing assertion appears at page 4:

> "***petitioner's claim that there is an implied immunity of the states and localities from federal taxation has long been discredited."

There is no authority to support such a statement. One must conclude that the quoted statement borders on the inane in light of the fact that the memorandum in which it was written was submitted after this Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976).

POINT III

THE TAX IN QUESTION DID NOT BECOME A USER CHARGE SIMPLY BECAUSE ITS PROCEEDS HAVE BEEN EARMARKED FOR AIRWAY IMPROVEMENT.

The question which we discuss now is whether the creation by the 1970 legislation of the Airport and Airway Trust Fund and the appropriations of the amounts of

tax collected to finance it, converted that which had been denominated a tax into a charge.

We assert that, even if the tax receipts or their equivalent did go into the Trust Fund, they are nevertheless receipts of taxes and not of charges. The Federal government has, in Texas v. United States, supra, taken the position that the Air Transportation Tax (I.R.C. §4261) was converted into a charge by the 1970 legislation which set up the Trust Fund. Yet the only change in the substance of the tax on Transportation by Air made by the 1970 Act was to raise its rate from 5% to 8% and to remove the exemption given by I.R.C. §4292. We have spoken before about the House Committee's characterization of the tax and observed that, if the Congress had intended to convert what had been a tax into a "user charge", it would have done so

in appropriate language in the statute, not solely in the Committee reports. An unambiguous statute is to be interpreted in accord with the language it employs, and the language employed in passing the instant legislation is that of taxation. It is not different — from the many other sections of the Internal Revenue Code which impose various other taxes.

There are situations in which a true charge is imposed. The City of New York, for example, has since 1962 imposed an annual vault charge (Admin. Code of the City of New York, Chapt. 46, Title Z). The charge is made to owners of property abutting a vault which is used and maintained by them under a City street. There is a direct relationship between the charge and something furnished by the City. The charge is called a charge and not a tax in the law imposing it (id. §Z46-2.0).

In First Nat. City Bank v. City of New York Finance Administration, 44 AD 2d 774, 354 N.Y. Supp. 2d 901 (1st Dept., 1974), mot. for lv. to app. den., 34 NY 2d 519 (1974), the plaintiff, a national bank, claimed immunity from the vault charge under a federal statute which limited taxation of national banks. The courts upheld the charge because it was not a tax.

All taxes are imposed for the purpose of defraying the cost of government, and that cost is always incurred for the benefit of taxpayers and the general public. In a sense, consequently, all taxes can be said to be imposed for services rendered and to be rendered. Under the theory adopted by the Federal government in this case, the remaining vestiges of the sovereign immunity enjoyed by the states and localities

could be destroyed by the simple expedient of earmarking the proceeds of each Federal tax for a particular activity of government. To the extent that a tax defrays more than one kind of governmental expense, it could be, by statute, assigned to defraying the costs of specified categories of expense.

There is no assurance that the trust fund which is enriched by the taxes in question will remain dedicated to the purposes to which it presently is devoted. Diversion has, in fact, happened with the so-called Highway Trust Fund (funded in part by the gasoline tax), and there are movements looking toward a greater diversion of the moneys in that trust fund to mass transit.

That fund was created by §209 of P.L. 84-627, June 29, 1956, c.462, Title II, 70 Stat. 397; 23 U.S.C. §120 f.n. The earliest diversion of funds from that fund for non-

highway purposes came when P.L. 91-605, Title I, §111(a), Dec. 31, 1970, 84 Stat. 1719; 23 U.S.C. §142, directed their use in aid of the construction of preferential bus lanes, loading areas and other facilities, including parking facilities, for mass transportation purposes. The pretext was that these were allied to highway purposes, but the next step was to permit the Secretary of Transportation, beginning in July of 1974, to use some of the Fund for the purchase of buses and, beginning in 1975, to use it for the construction and improvement of rail facilities and the purchase of rolling stock. P.L. 93-87, Title I, §121(a), Aug. 13, 1974, 87 Stat. 259; 23 U.S.C. §142.

From this it is plain that the original dedication of tax receipts to a particular purpose benefiting the taxpayer is readily changeable at the will of the Congress and,

if this may be done, it is hard to see how those taxes can be considered as user charges for the benefit of the taxpayer.

CONCLUSION

The judgment appealed from should be reversed, and the amount of the tax in issue should be refunded.

Respectfully submitted,

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